No. 96-1569

In The

Supreme Court of the United States

October Term, 1997

DANIEL BOGAN AND MARILYN RODERICK,

Petitioners,

versus

JANET SCOTT-HARRIS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF FOR RESPONDENT

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STATEMENT OF THE FACTS

Janet Scott-Harris was hired by the City of Fall River, Massachusetts in 1987 to be the city's first administrator of the newly created Department of Health and Human Services. Scott-Harris was the first African-American ever to work for the city in an administrative position.[1] *See* Tr. Trans. 5:14.

Scott-Harris encountered racial hostility from two people at city hall: the petitioner Marilyn Roderick, who was a long-time city council member,[2] and Dorothy Biltcliffe, a well-connected city employee who eventually came under Scott-Harris' direct supervision. Both are white. Problems with Roderick began early in Scott-Harris' tenure when the two were interviewing candidates for a new position. Roderick made references to an African-American candidate's race and about black people. Scott-Harris took offense at these comments and the two women got into a heated argument, in which Scott-Harris said Roderick's remarks were racist. *Id.* 2:39-42. Scott-Harris later called Roderick to try to make amends but Roderick hung up on her. *Id.* 2:48. After that confrontation their relationship was bitter and conflicting. *Id.*

Dorothy Biltcliffe was director of the Council on Aging Nutrition Program. In July 1990 Biltcliffe began to report directly to Scott-Harris. Biltcliffe refused to take directions from Scott-Harris. Other employees complained that Biltcliffe yelled at them and threatened them, often making racial remarks. *Id.* 2:56-57. Speaking to other city employees, she referred to Scott-Harris as the "black nigger bitch," *Id.* 2:60, and to another nutrition program employee as a "little black bitch." *Id.* 2:43.

Biltcliffe's conduct came to a head in October 1990 when she flew into a rage at a meeting and called a subordinate a "bitch with her head stuck up [Scott-Harris'] ass." *Id.* 43. She said she was

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[1] Fall River has a population of 92,703 of whom 952 are African-American. United States Census, 1990, Database C90STF1A.

[2] The defendant Marilyn Roderick had been "in city government" in Fall River for 20 years. *See* Tr. Trans. 5:53. At the time of trial she had been on the city council for 18 years. *Id.* 5:6. She was chairman of the council's ordinance committee for nine years, vice chairman and then president of the city council in 1991. *Id.* 2:36.

not going to take this treatment and would "go to the sixth floor"[3] and get anything [she] wanted." Scott-Harris heard of this and interviewed a dozen or so employees, uncovering more racist statements. One minority employee complained that Biltcliffe called her a "black bitch" and said she was going to get rid of her. Biltcliffe referred to Scott-Harris as a "black nigger." *See* Trial Ex. 6. Another employee complained of "vulgarity, profanity as well as racial and ethnic slurs" by Biltcliffe. *See* Trial Ex. 7. Another minority employee told Scott-Harris that Biltcliffe had yelled at her that it is "just like you niggers" to stick together against her. *See* Tr. Trans. 2:61-65.

Scott-Harris asked for an assistant corporation counsel to help draw up charges against Biltcliffe, the standard procedure in such matters. Assistant Corporation Counsel Paul Desmarais, however, told Scott-Harris that he wouldn't "touch a case with Dorothy Biltcliffe, she has been around a long time and she was really tough." Desmarais said he would talk with Bruce Assad, corporation counsel, and that they would see if they could find some one to help Scott-Harris. Initially, however, no attorney was appointed and Scott-Harris was forced to draw up the charges against Biltcliffe by herself. *Id.* 2:68-69.

Scott-Harris gave the charges to Biltcliffe. *See* Trial Ex. 8. Biltcliffe responded by calling Scott-Harris "nothing but a black nigger bitch" and said Scott-Harris would not get away with this, that she "knew people," that she knew things and that Scott-Harris was "going to be sorry." *See* Tr. Trans. 2:72-2:73. Within four months Scott-Harris' job had been "eliminated." *Id.* 2:123-124. Biltcliffe went on medical leave immediately after being informed of the charges against her, to return with a new, make-work position after Scott-Harris lost her job. Her physician, who recommended the medical leave, was the chairman of the city's Board of Health. *Id.* 2:85-2:86.

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[3] The mayor's office was on the sixth floor of City Hall. *See* Tr. Trans. 2:48.

Biltcliffe asked several politicians to help her with the discrimination charges. She contacted Councilwoman Roderick[4] and asked her for help. Roderick told Biltcliffe that Scott-Harris had called her a racist, too. Roderick spoke with City Manager Robert Connors on Biltcliffe's behalf. *See* Trial Trans. 5:29-33. Biltcliffe asked another city council member, Raymond Mitchell, for help. Roderick and Mitchell are "very close friends" and they discussed Biltcliffe's problem. *Id.* 5:50. Biltcliffe also called a local state senator for help. He summoned Scott-Harris to his office, asked her to help Biltcliffe and warned that City Manager Connors "will do what I tell him to do."[5] *Id.* 2:82.

Shortly after bringing charges against Biltcliffe, Scott-Harris began hearing rumors that her position "was going to take a political hit." Then on February 12, 1991, Connors told Scott-Harris that her position was indeed being eliminated, allegedly for financial reasons. *Id.* 2:123-124. Shortly after that Mayor Bogan submitted an ordinance to the City Council that would eliminate the Department of Health and Human Services. The only financial effect of that ordinance was the elimination of Scott-Harris' job. *Id.* 5:39. Mayor Bogan wrote to the city clerk on March 18, 1991 eliminating Scott-Harris' position effective March 29, even though the city council had not acted on his recommendation. *See* Trial Ex. 29. The city council's ordinance committee, chaired by Roderick, approved elimination of Scott-Harris' position and Roderick sent the ordinance

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[4] Roderick had helped Biltcliffe in the past with Scott-Harris. When salary increases were proposed for some employees in the elderly nutrition program, the matter was to be heard by the city council's ordinance committee, chaired by Roderick. Roderick ordered Scott-Harris, who had just had foot surgery and was on crutches, to attend the meeting. At that meeting, which was broadcast on local cable television, Roderick yelled and pointed her finger at Scott-Harris, asking why Dorothy Biltcliffe wasn't getting a raise. "She told me to read her lips. She [said she] didn't hire me to do what I thought should be good for the department, that there were other people above me that told me what I should do for the department. She just yelled and yelled and she pointed," Scott-Harris said. *Id.* 2:50.

At several other public meetings Roderick spoke to Scott-Harris in a tone of voice that was "just ugly," a tone of voice she did not use in speaking to other city managers. *Id.* 2:52-53.

[5] This state senator later interceded with Bogan on Biltcliffe's behalf to have her punishment reduced. *See* Trial Ex. 75, *see also* Tr. Trans. 7:76.

to the full council. *See* Trial Ex. 30. Shortly before the council voted, a councilor friendly to Scott-Harris called her and asked why "they were trying to get rid of" her. *See* Tr. Trans. 4:49-4:50. The city council voted 6-2 to eliminate her position. The only new position added by the City of Fall River 1992 budget was a new second administrative assistant in the Council on Aging, a position filled by Dorothy Biltcliffe. *Id.* 6:73-74.

Marilyn Roderick, Daniel Bogan and witnesses for the City of Fall River all said the one and only reason for the elimination of Scott-Harris' position was to save the city money. *See* Tr. Trans. 5:40,[6] 5:51 (C.A. at 774), 6:80. They all testified her job performance had nothing to do with the decision to eliminate her position. *Id.* 5:40 (C.A. at 682), 5:51 (C.A. at 774), 6:80. In fact, they said, her job performance had been excellent. *Id.* 5:14-5:15, 6:81. The respondent offered substantial evidence demonstrating that their financial justification was pretextual:

Bogan was not really anticipating a cut in state aid — Daniel Bogan assumed the position of mayor in December 1990.[7] *See* Tr. Trans. 6:77. In January of 1991 he claimed he received a "flyer" indicating there could be a ten percent cut in state funding. *Id.* 5:39 and 6:84. Because of that anticipated cut, he testified, he decided to trim city spending, including eliminating Scott-Harris' position. *See* Trial Ex. 29. At the same time that Bogan proposed to eliminate Scott-Harris' position because he claimed he anticipated a reduction in state funding, Bogan submitted his annual budget proposal, *see* Trial Ex. 40, to the City Council. In that proposal he anticipated an <u>increase</u> in state funding.[8]

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[6] Due to a typographical error, a portion of the transcript of the fifth trial day contains duplicates. The passage cited above can be found at page 682 of the Court of Appeals Consolidated Appendix (hereafter "C.A.").

[7] Bogan had been a City Council member for twenty years and president for fourteen years. *See* Tr. Trans. 6.77.

[8] In Mayor Bogan's introduction to that 1992 budget, *see* Trial Ex.40, Bogan said the budget was prepared assuming "$62,802,604 from State Aid (Cherry Sheet)." *Id.* The prior year's budget, *see* Trial Ex.39, states it was prepared based on "$61,623,177 from State Aid (Cherry Sheet)." *Id.* The jury thus could have concluded that rather than anticipating a decrease in state aid from fiscal year 1991 to 1992, Bogan prepared his budget assuming an increase in state aid.

Firing Scott-Harris actually cost the city money — For the last year or so prior to her termination, the positions of the three department heads Scott-Harris supervised — Veterans Affairs, Public Health and the Council on Aging — were all vacant.[9] While those positions were vacant Scott-Harris performed all the day to day duties of each of those positions. *See* Tr. Trans. 2:114-166, 4:31, 6:83. Mayor Bogan had no complaints about the way Scott-Harris was performing her job or the three vacant jobs. *Id.* 6:83. Even though Scott-Harris had been performing those jobs for more than a year with no problems, all three positions were funded in the fiscal year 1992 budget and were filled shortly after Scott-Harris left. The city saved $46,305 by eliminating Scott-Harris' position. *See* Trial Ex. 39A. The city then spent $105,205 to hire replacements for the three vacant positions whose jobs Scott-Harris had been performing for more than a year with no problems or complaints.[10]

Bogan did not consider other options for saving money — Department heads, including Scott-Harris, were told to prepare reduced budgets in case there was a decrease in state funding. Scott-Harris submitted budget proposals, *See* Tr. Trans 5:42-43, which recommended not filling 50 to 60 vacant positions and changing the work days of school nurses so that they only worked when school was in session, rather than year round. *Id.* 2:121. Those proposals would have trimmed at least 10 percent of her department's budget.[11] *Id.* 2:122, 5:43.

Instead, Bogan decided to eliminate Scott-Harris' job. He conceded that when he sent the City Council his proposed ordinance eliminating Scott-Harris' position he had not looked at or even considered her own budget proposals for her department and was

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[9] As of Scott-Harris' last day with the city the director of the Council on Aging position had been vacant for nine months. *See* Tr. Trans. 2:55. The head of the Veterans Affairs Department position had been vacant for seventeen months. *Id.* 2:116. The director of Public Health died in September 1989 and his position had remained vacant for eighteen months. *Id.* 2:114.

[10] *See* Trial Ex. 40A at 1497 (Health), 1505 (Veterans), 1515 (Council on Aging) of the consolidated appendix.

[11] City Manager Connors, too, gave Bogan a budget cutting proposal "that would have satisfied the [anticipated] reduction" without removing Scott-Harris. Bogan rejected that proposal. *See* Trial Trans. 5-44, C.A. at 767.

unaware that her proposal to pay school nurses only when schools were in session alone would have saved the city more money than was saved by eliminating her position. *Id.* 6:90-91.

Mayor Bogan could have saved Scott-Harris' salary in several different ways without resort to an ordinance abolishing her position. He could have acted on his own under statutory authority under Mass. G.L. c. 43 § 54, *see* Tr. Trans. 6:67, Trial Ex. 85, and simply removed Scott-Harris from her position. He could have left the position vacant but unfunded.[12] *See* Tr. Trans. 6:69. Petitioners concede that had Bogan chosen these options he would not be entitled to assert a defense of legislative immunity. Pet. Br. at 38-39. His other option was to recommend to the City Council that the Department of Health and Human Services be eliminated and that Scott-Harris be replaced by hiring people to fill the three vacant positions for which she was responsible. Each of these options would have saved the city the cost of her salary. *Id.* 6:69. Bogan chose to go to the city council. *See* Tr. Trans. 6:80.

Bogan's conduct after eliminating her job showed his animus against Scott-Harris — Bogan's desire to remove Scott-Harris from city government was demonstrated by his actions after he eliminated her job. He offered her the public health director position at a $10,000 cut in pay. *See* Trial Ex. 14. When Scott-Harris accepted, *see* Trial Ex. 17, however, Mayor Bogan added new, problematic duties to the position and relocated her office to an undesirable location. *See* Tr. Trans. 2:130. Scott-Harris prepared a rejection letter, but changed her mind. She retrieved and destroyed what she believed were all the copies of the letter. She sent a new letter to Mayor Bogan accepting the position. *Id.* 2:134-135, 3.3-3.6, Trial Ex. 20. Bogan had his secretary retrieve a torn up copy of the rejection letter from a waste basket, *see* Tr. Trans. at 6:16, 7:66, and then wrote to Scott-Harris acknowledging her rejection of his offer. *See* Trial Ex. 23.

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[12] For example, the positions of directors of public health, veterans affairs and the council on aging had all been left vacant to save money. All three positions had been created by ordinance, just as Scott-Harris' had been. *See* Tr. Trans. 5:47. City Council action had not been needed to leave those ordinance-created positions vacant.

The central issue at trial was whether the defendants eliminated Scott-Harris' position to retaliate against her for objecting to Biltcliffe's racism or to save money. Daniel Bogan testified he had "no reason, other than pure economics, saving money," for his recommendation that respondent's job be eliminated. *Id.* 6:80. Marilyn Roderick testified her "one and only reason for eliminating" Scott-Harris' position "was because it was expected there was going to be a shortage of money." *Id.* 5:40.

The jury clearly did not believe this testimony. The jury found that Scott-Harris proved the reason given by the defendants for elimination of her position was not the true reason (Question 1), that Scott-Harris' "constitutionally protected speech was a substantial or motivating factor" in the decision to eliminate her position (Questions 2, 6 and 9), and that Roderick's vote (Question 7) and Bogan's recommendation (Question 10) proximately caused the elimination of her position.

SUMMARY OF THE ARGUMENT

I. Absolute legislative immunity in § 1983 actions should not be extended to the local level. The existence of an analogous common law immunity in 1871 is a necessary first step to a finding that Congress intended that a particular group of officials would be immune from § 1983 liability. The best evidence of the state of the common law comes from this Court itself. Just one month before the 1871 Civil Rights Act was passed by Congress this Court upheld two monetary claims against members of local governing bodies for their legislative actions. In *Amy v. The Supervisors*, 11 Wall. (78 U.S.) 136 (1871), this Court upheld a damage award against the supervisors of Des Moines County, Iowa personally for refusing to obey a court order that they levy a tax to pay a judgment. This Court said, "There is a common law liability. . . . The rule is well settled that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect." 11 Wall at 138. In a companion case, *Farr v. Thompson*, 11 Wall. (78 U.S.) 139 (1871) this Court held that members of the

Racine City Council could be sued for damages personally for failing to raise taxes to pay a judgment.

These decisions followed a well established line of nineteenth century common law decisions holding local legislators personally liable for "ministerial" acts in their legislative capacity. "Ministerial" acts included conduct that would be considered clearly legislative conduct today if done by Congress or a state legislature. Such conduct was termed "ministerial" only because the legislative body had no discretion.

In 1871 different immunity rules applied to legislators at the local level than at the state level. Even though members of state legislatures were absolutely immune from liability even when they acted maliciously, members of municipal governing bodies could be held personally liable for their tortious conduct when they used their official powers maliciously or in bad faith. For example, in *Bradley v. Heath*, 12 Pick. 164 (Mass. 1831), the Massachusetts Supreme Judicial Court held that a slander action could be maintained against a member of the Town of Brookline Board of Selectmen if he acted with malice. That decision was by the same state court that earlier had held, also in a slander action, that a state legislator was absolutely immune from liability. *Coffin v. Coffin*, 4 Mass. 1 (1808). This limited good faith immunity the common law granted members of local governing bodies is the equivalent of present day qualified immunity.

The absence of absolute immunity prior to 1871 has been regarded by this Court as dispositive where the position in question, like the level of immunity accorded to such individuals, "was known to American common law." *Burns v. Reed*, 500 U.S. 478, 493 (Emphasis in original).

Even if this Court examines policy reasons for granting immunity, the Court should find that the policies behind § 1983 are best served by qualified immunity at the local level. Qualified immunity is the norm for state officials because "to extend absolute immunity to any group of state officials is to negate *pro tanto* the very remedy which it appears Congress sought to create." *Imbler v. Pachtman*, 424 U.S. at 434 (White, J., concurring). Petitioners suggest several policy reasons for absolute immunity but this Court

has already determined that qualified immunity is sufficient to meet each of those concerns. *Butz v. Economou*, 438 U.S. 478, 506 (1978)(skewed official decisions), *Wood v. Strickland*, 420 U.S. 308 (1975)(skewed official decisions, deterrence from government service); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)(time and effort of litigation).

Further, no workable rule can be created that would give clear guidance to local officials as to when their conduct would be deemed administrative and when it would be legislative. Local governments range from New England town meetings, where the legislature is as large as the adult population, to some Southern counties that grant the totality of legislative and executive power to a single county commissioner. *See Holder v. Hall*, 512 U.S. 874 (1994). In contrast to the conscious separation of powers in the state and federal governments, most local governments have gone to great pains to merge executive and legislative functions. Efforts by the lower courts to create formulae to distinguish "legislative" acts from "administrative" ones have created a smorgasbord of theories and results.

Experience shows that absolute immunity is most frequently asserted in defense of actions affecting single individuals or businesses. In a vast majority of the reported cases, as here, the litigation concerned actions which arose out of a single controversy, affected only a handful of particular individuals, and involved no rule of general application.

Absolute immunity would embolden local legislators who well know their conduct could violate constitutional rights to proceed nonetheless, thus defeating of the deterrence policy underlying § 1983. "Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he should be made to hesitate. . ." *Harlow v. Fitzgerald*, 457 U.S. at 819.

II. Petitioners' conduct fails to meet this Court's definition of "legislative" for immunity purposes. In *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731 (1980), this Court held that the regulations at issue were "legislative" because they were "rules of general application . . . [that] act not on [particular] parties . . ." The

ordinance abolishing respondent's job can hardly be characterized as "a rule of general application" since its only impact was to eliminate the respondent's job. The mayor admitted he could have achieved the same result by simply firing respondent and not hiring a replacement. As such, eliminating the respondent's position was not a "legislative" act.

III. Petitioners failed to preserve any objection to the sufficiency of the evidence regarding proximate cause. Neither party filed a motion for a directed verdict or for judgment n.o.v. on the same proximate cause ground now advanced in this Court.

Petitioners' conduct was the proximate cause of plaintiff's loss of employment. Applying general tort principles of causation, since the elimination of plaintiff's position was a foreseeable and expected and intended result of the petitioners' conduct, that conduct was the proximate cause of plaintiff's injuries.

ARGUMENT

I. ABSOLUTE LEGISLATIVE IMMUNITY IN § 1983 ACTIONS SHOULD NOT BE APPLIED AT THE LOCAL LEVEL.

A. Introduction.

The threshold question presented by this case is whether in civil rights actions under 42 U.S.C. § 1983 members of local governing bodies should be accorded absolute immunity for their "legislative" actions. This Court expressly reserved that issue in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391, 404, n. 26 (1979) and *Spallone v. United States*, 493 U.S. 265, 278 (1990).

The Court does not write on a blank slate concerning municipal legislative bodies. In *Wood v. Strickland*, 420 U.S. 308 (1975), this Court recognized that "school board members function at different times in the nature of legislators and adjudicators," 420 U.S. at 319, and that "[t]he overwhelming majority of school board members are elected to office." 420 U.S. at 320, n. 11. Despite their legislative function as elected public officials, this Court found that

school board members were entitled to a qualified immunity in § 1983 actions, but not to absolute immunity. 420 U.S. at 315-320.

Petitioners have not asked this Court to overrule *Wood v. Strickland*. The issue thus is whether a different form of immunity is necessary for members of municipal governing bodies than was found proper and sufficient for elected members of school boards. Some school boards, of course, have far greater responsibilities than many towns. The New York City Board of Education, for example, has an annual budget of $8.84 billion and provides educations for 1,075,605 students, ten times Fall River's population.[13] The City of Fall River, with a 1991-1992 annual budget at issue in the present case of $111,347,548, *see* Trial Ex. 40, is dwarfed by the New York City Board of Education.. Petitioners seek absolute immunity for members of all municipal governing boards, which would include, as an example, the Board of Selectmen of the town of Hubbardston, Massachusetts, which has a municipal budget of $3,494,606 for its 3,364 residents.[14]

Petitioners seek a vast expansion of immunity from the nation's civil rights laws. Some 96 percent of the nation's elected officials are officials of local governments. There are 535 members of Congress protected by the Speech or Debate clause of the Constitution. There are approximately 7,461 state legislators within the scope of *Tenney v. Brandhove,* 341 U.S. 367 (1951). If absolute immunity is granted to members of city and county governing bodies, some 342,812 additional persons will be able to engage in knowing and deliberate violations of the federal constitution free from any liability.[15]

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[13] Board of Education, City of New York, New York Educational Network (1997).

[14] Massachusetts Department of Revenue, Division of Local Services, At A Glance Reports (1997).

[15] 1992 Census of Governments, Volume I, Government Organization, Number 2, Popularly Elected Officials, U.S. Dept. of Commerce, Bureau of the Census, June 1995 (hereafter "1992 Census"), p. 1, Table 1 Elected Officials of State and Local Governments by Region and Type of Government: 1992. The figures are for elected members of governing boards, which the Census Bureau defined as "the principle policymaking body for a government" *id*, p. x, and includes Congress at the federal level and state legislatures at the state level. Appendix B, p. B-1.

At least until the early 1980's the prevailing view in the lower federal courts was that absolute legislative immunity did not extend to the local level and that local officials were protected by no more than qualified immunity. A leading case so holding was authored by Judge Potter Stewart, *Nelson v Knox*, 256 F.2d 312, 314 (6th Cir. 1958), in which the court said, "In the light of the relevant federal decisions, we cannot agree that members of a municipal legislative body share the complete immunity from liability which is enjoyed by judges and state legislators." The decision in *Nelson* remained the controlling precedent in the Sixth Circuit until just nine years ago.[16] Other federal courts also held that absolute legislative immunity was not available to local government officials.[17] Some

[16] *See Haskell v. Washington Twp.*, 864 F.2d 1266 (6th Cir. 1988).

[17] For example, in *Cobb v City of Malden*, 202 F.2d 701(1st Cir. 1953), Chief Judge Magruder, concurring, said:

> [T]he defendant members of the city council were exercising legislative functions, on a subordinate level. But it seems that, as respects members of similar subordinate legislative bodies, there has not been such a general and unquestioned recognition at the common law of an absolute immunity from civil liability for acts done by such persons in their official capacity, comparable to the complete immunity accorded to members of state legislatures.

See also, Barr v. Mateo, 360 U.S. 564, 579 (1959) (Warren, J., dissenting)("However, this [absolute legislative] immunity has not been extended to inferior deliberative bodies); *Bruce v. Riddle*, 631 F.2d 272, 276 and n. 4 (4th Cir. 1980)("There is little, if any, early American precedent indicating that such early immunity extended to individuals exercising legislative functions in political subdivisions of the lower echelon. The early American cases . . . were concerned for the most part with types of qualified immunity. . . . "); *Thomas v. Younglove*, 545 F.2d 1171 (9th Cir. 1976)(*Tenney* applies to state legislators but "not necessarily to those other state or local officials whose duties can be characterized as partially legislative"); *see also West Side Women's Services v. City of Cleveland*, 573 F. Supp 504, 524 (N.D. Ohio 1983); *Blodgett v. County of Santa Cruz*, 553 F. Supp. 1090 (N.D. Cal. 1981);*German v. Killeen*, 495 F. Supp 822, 830 (E.D. Mich 1980); *Fralin & Waldron, Inc. V. County of Henrico*, Va. 474 F. Supp 1315 (E.D. Va. 1979);*Crowe v. Lucas*, 595 F 2d 985, 989 (5th Cir 1979); *Cameron v. Montgormery County Child Welfare Service*, 471 F. Supp 761 (E.D. Pa. 1979); *Hamilton v. Covington*, 445 F. Supp 195, 200 (W.D. Ark 1978); *Kucinich v. Forbes*, 432 F. Supp 1101, 1108 n 8 (N.D. Ohio 1977); *Adler v. Lynch*, 415 F. Supp 705 (D. Neb. 1976); *Jones v. Diamond*, 519 F 2d 1090 (5th Cir 1975); *Lane v. Inman*, 509 F.2d 184 (5th Cir. 1975); *Oberhelman v. Schultze*, 371 F. Supp 1089, 1090 (D. Minn 1974);

courts relied on *Wood v. Strickland* to hold that local officials have qualified immunity.[18] Within the last fifteen years, however, the lower federal courts have largely changed their view, primarily after this Court's decision in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391. *See* Pet. Br. 21. None of these more recent federal court decision was based on any historical analysis of common law immunity for municipal legislators as of 1871, which this Court says is a necessary first step to a finding of absolute immunity.

B. Members of Local Governing Bodies Did Not Have Absolute Immunity at Common Law.

This Court's analysis of whether a state official is immune from § 1983 liability and, if so, the scope of that immunity, begins with an examination of the common law in 1871, as the members of the 42nd Congress would have understood it.[19]

> The principles applied to determine the scope of immunity for state officials sued under . . . 42 U.S.C. Section 1983 are by now familiar. Section 1983, on its face, admits of no defense of official immunity. It subjects to liability "[e]very person" who, acting under color of state law, commits the prohibited acts. In *Tenney v. Brandhove*, 341 U.S.

Gaffney v. Silk, 488 F 2d 1248, 1250 (1st Cir.1973); *Ka-Haar, Inc. V. Huck*, 345 F. Supp 54, 56 (E.D. Wisc. 1972); *Curry v. Gillette*, 461 F.2d 1003 (6th Cir.), *cert. denied*, 409 U.S. 1042 (1972); *Lynch v. Johnson*, 420 F. 2d 818, 821-22 (6th Cir 1970); *McLaughlin v. Tilendis*, 398 F 2d 287, 290 (7th Cir 1968); *Parine v. Levine*, 274 F. Supp 268, 269 (E.D. Mich 1967); *Progress Developement Corp v. Mitchell*, 286 F 2d 222, 231 (7th Cir 1961).

[18] A number of lower court decisions have relied on *Wood* in holding that absolute legislative immunity is unavailable to city and county councils. *Adler v. Lynch*, 415 F.Supp 705, 712 (D. Neb. 1976); *Altaire Builders v. Village of Horseheads*, 551 F.Supp 1090, 1105 (N.D. Cal 1981); *Cameron v. Montgomery County Child Welfare Service*, 471 F.Supp 761, 764 (E.D. Pa. 1979).

[19] "The reason our earlier decisions interpreting § 1983 have relied upon common law decisions is simple: members of the 42nd Congress were lawyers, familiar with the law of their time. In resolving ambiguities in the enactments of that Congress, as with other Congresses, it is useful to consider the legal principles and rules that shaped the thinking of its members." *Smith v Wade*, 461 U.S. 30, 66 (1981) (Rehnquist, J. dissenting).

> 367, 376 (1951), however, we held that Congress did not intend Section 1983 to abrogate immunities "well grounded in history and reason." Certain immunities were so well established in 1871, when Section 1983 was enacted, that "we presume that Congress would have specifically so provided had it wished to abolish" them.

Buckley v. Fitzsimmons, 509 U.S. 259, 267-68 (1993).

Time and again this Court has affirmed that the existence of an analogous common law immunity in 1871 is a necessary first step to a finding that state officials are immune from § 1983 liability. "If parties seeking immunity were shielded from tort liability when Congress enacted the Civil Rights Act of 1871 -- § 1 of which is codified at 42 U.S.C. § 1983 -- we infer from legislative silence that Congress did not intend to abrogate such immunities when it imposed liability for actions taken under color of state law." *Wyatt v. Cole*, 504 U.S. 158, 164 (1992).[20] Most recently, in *Richardson v. McKnight*, 117 S.Ct. 2100 (1997), in which this Court held that private prison guards do not have qualified immunity, the Court noted that both the concurring and the dissenting justices in *Wyatt v. Cole*, 504 U.S. 158, agreed that the common law history is the source of any immunity under § 1983.

Petitioners expressly invoke this historical approach. They urge that in 1871 the immunity of local legislative officials from civil liability was, like the immunities of state judges and state legislators, well established.

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[20] *See also, Malley v. Briggs*, 475 U.S. 335, 342 (1986) ("We reemphasize that our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice, and that we are guided in interpreting Congress' intent by the common law tradition."); *Pulliam v. Allen*, 466 U.S. 522, 529 (1984) ("The starting point in our own analysis is the common law. Our cases have proceeded on the assumption that common law principles of legislative and judicial immunity were incorporated into our judicial system, and that they should not be abrogated absent clear legislative intent to do so. Accordingly, the first and crucial question is whether the common law recognized judicial immunity from prospective collateral relief"). *Dennis v. Sparks*, 449 U.S. 24, 29 (1980) ("The immunities of state officials that we have recognized for purposes of § 1983 are the equivalents of those that were recognized at common law . . . ").

> [T]he principle of absolute immunity . . . was never limited to particular levels of our government, whether federal, state, regional or municipal. . . . Nor is there anything to suggest that, by the time Congress enacted § 1983 in 1871, municipal legislators had come to be viewed as *sui generis* and, therefore, not entitled to the same absolute immunity enjoyed by legislators at other levels of government.

(Pet. Br. 23). Indeed, petitioners suggest, absolute legislative immunity at the city and county level was so well established in 1871 that "[n]o reported case can be found in which . . . the officers of a municipal corporation . . . were sued for legislative acts, whether they were unconstitutional, oppressive, malicious, or corrupt." Pet. Br. 24, n. 10.

The historical record is otherwise. The starkest proof that members of the 1871 Congress would have known that the common law did not recognize absolute immunity at the local level is that in March 1871, less than a month before the enactment of the 1871 Klu Klux Klan Act, this Court upheld two damage claims against local legislators. In *Amy v. The Supervisors*, 11 Wall. (78 U.S.) 136 (1871), this Court upheld a judgment of $12,108.03 against the supervisors of Des Moines County, Iowa personally. The plaintiff had earlier secured a judgment against the county on certain county notes, and then an order directing the supervisors to levy a tax sufficient to pay that first judgment. When they failed to do so, the plaintiff brought a new action against the supervisors personally for the amount of the prior judgment plus damages occasioned by their failure to levy the tax needed to pay that judgment. This Court rejected arguments that the individual supervisors could not be held personally liable, ruling that the supervisors official conduct had violated a clear legal obligation:

> There is a common law liability. . . . The rule is well settled that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an

> unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender.

11 Wall at 138.[21] In a companion case, decided the same day as *Amy*, this Court held the members of the Racine City Council could be sued for damages for failing to raise taxes to pay a judgment. *Farr v. Thompson*, 11 Wall. (78 U.S.) 139 (1871).[22] In summarily finding the members of the city council personally liable for their failure to vote to raise taxes, this Court simply stated, "The proper solution of the question submitted is too clear to admit of doubt or require discussion." 20 L.Ed. 102.

This Court's decisions in *Amy* and *Farr* followed a well established line of common law decisions holding local legislators personally liable. For example, in *Morris v. The People*, 3 Denio 381 (N.Y. 1846), New York's highest court affirmed a judgment of $250 personally against the mayor of New York, in his capacity as a member of the city's board of supervisors, for voting at a supervisors' meeting against paying the salary of a judge he claimed had not been properly appointed. The court reasoned that the board of supervisors' duty was fixed by law, leaving them no discretion. "They were to 'audit and allow' it by a certain day, under a salary ascertained and fixed by law. . . . Their duty was, therefore, of a ministerial character only. . . ." 3 Denio 395. In *Caswell v. Allen*, 7 Johns. 63 (N.Y. 1810), the court upheld an action against a supervisor of Cayuga County for having voted against a tax to raise funds for a courthouse and jail, in asserted violation of state law requiring that such funds be raised. In other decisions of this era the dispositive issue in holding a member of a municipal governing body

[21] The decision in *Amy* is all the more significant because, prior to the commencement of the suit against the supervisors, Iowa had repealed a state law expressly authorizing damage actions against supervisors who violated their legal duties. This Court rejected the suggestion that that repeal was a bar to Amy's suit. "There is a common law liability which was not affected by the repeal. The statute was only cumulative on the subject." 11 Wall. at 138.

[22] A somewhat more complete account of *Farr* is to be found in 20 L.Ed. 102. Details of *Amy* and *Farr* are set forth in the Transcript of Record, No. 93 and No. 73, respectively, December Term, 1870.

personally liable for his official conduct was whether he had violated a clear legal duty leaving him no discretion.[23]

In these cases, as in *Amy* and *Farr*, nineteenth century courts relied on the distinction between ministerial acts and discretionary acts. Ministerial acts were those in which public officials, including members of local governing bodies, were required (or forbidden) to act in a specific manner, either because the action did not involve the use of discretion, such as the issuance of a properly authenticated liquor license, or because the operation of the law required only one course of action, as in paying a judgment. As *Amy* and *Farr* demonstrate, "ministerial" acts could include conduct such as voting to levy a general tax, that would be considered clearly legislative

[23] *See Bartlett v. Crozier*, 17 Johns. 439, 451 (N.Y. 1820) (commissioners liable for violation of a "certain, stable and absolute duty", but not for the exercise of "discretion"); *Wilson v. the Mayor and City of New York*, 1 Denio 595, 599 (N.Y. 1845)(court distinguished between the discretionary power to "decide when and where . . . [drainage and sewer] works shall be made," for which there was no liability, and the ministerial duty to keep sewers in repair, for neglect of which there was liability); *Wasson v. Mitchell*, 18 Iowa 153, 155-56 (1864) (members of county board of supervisors liable for violation of ministerial duty; where supervisors exercised their "judgment" "[i]t is only necessary that they . . . shall act in good faith; statutory requirements regarding conduct by the supervisors would be "useless . . . and . . . unavailing . . . if the board or officer could under no circumstances and in no possible event, be held liable for omission or neglect of duty"); *County Commissioners of Anne Arundel County v. Duckett*, 20 Md. 468, 479 (1863) (commissioners would be liable if they violated a "certain, stable, absolute duty"); *Wall v. Trumbull*, 16 Mich. 228, 234, 42 N.E. 823 (1867) (issue is whether a member of the township board was exercising "judgment or discretion," or has "a line of conduct marked out for him, and he has nothing to do but follow it").

Cases cited by the petitioners simply do not support the proposition that members of local governing bodies could never be personally liable for their official acts. Most of the common law cases they cite specifically support the ministerial-discretionary doctrine. For example, *Hill v. Board of Aldermen of the City of Charlotte*, 72 N.C. 63, 65 (1875), says that there is liability for ministerial acts but not for discretionary acts. "The civil remedy for misconduct in office . . . depends exclusively upon the nature of the duty which has been violated. Where that duty is absolute, certain and imperative — and every ministerial duty is so — the delinquent officer is bound to make full redress." *Freeport v. Marks*, 59 Penn. St. 253, 257 (1868), relied on by *amicus* National League of Cities, *et al.*, says nothing about individual liability of local legislators, but merely says that "the legality of acts of legislative or corporate bodies cannot be tested by the motives of the individual members . . ."

conduct today if done by Congress or a state legislature. Such conduct was nonetheless termed "ministerial" only because the legislative body had no discretion.

The liability of local legislators was clearly recognized in the treatises of the era. The original 1872 edition[24] of John Dillon's Treatise on the Law of Municipal Corporations, cited this Court's decision in *Amy*:

> The members of a city council are not individually liable, in a civil or criminal action, for acts involving the exercise of discretion, unless they act corruptly. . . . [There is l]iability for nonfeasance or misfeasance, where the duty is specific, imperative, and not judicial, in its nature. . . . In *Amy v. Supervisors* . . . county supervisors were held to be personally liable for failing to levy a tax, as commanded by the court, to pay the plaintiff's judgment. . . .

Law of Municipal Corporations, § 176, p. 214, n. 2.[25]

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[24] Petitioners cite to a later, 1881, edition of Dillon. Pet. Br. 24-25.

[25] Cooley's 1880 Treatise on the Law of Torts 377 (1880), expressed the same view:

> [W]hen some particular duty of a ministerial character is imposed upon a legislative body, in the performance of which its members severally are required to act — no liberty of action being allowed, and no discretion — there can be a private action for neglect. Such ministerial duties are sometimes imposed upon members of subordinate boards, like supervisors and county commissioners, and when they are, if they are imposed for the benefit of individuals, the members may be personally responsible for failure in performance"

Similarly, Floyd R. Mechem, in his 1890 A Treatise on the Law of Public Offices and Officers, § 647, p. 432 (1890), relied on by the petitioners, Pet. Br. 25, indicates that the distinction between ministerial and discretionary acts remained viable at least through 1890:

> But the legislative officer, like the judicial, may be called upon to act ministerially, as when he is required to do some act in a prescribed manner irrespective of his own judgment as to the propriety or desirability of its being done, and in such a case he will be liable to the individual injured by his failure or neglect.

The common law was equally clear that different immunity rules applied for officials at the local level than at the state level. Even though members of state legislatures were absolutely immune from liability when they acted maliciously, members of municipal governing bodies could be held personally liable for their tortious conduct when they used their official powers maliciously or in bad faith.[26] An examination of slander actions against local legislators makes this point. This Court placed great reliance in *Tenney v. Brandhove*, 341 U.S. 367, 373-74 (1951), on *Coffin v. Coffin*, 4 Mass. 1 (1808), which this Court later referred to as "perhaps the earliest American case to consider the import of the legislative privilege." *Spallone v. U.S.*, 493 U.S. at 279. *Coffin*, in dicta, said that a state legislator was absolutely immune from personal liability for slander based on words spoken on the floor of the Massachusetts legislature. Petitioners make much of this case for the proposition that legislative immunity has long been a fixture of American common law. Pet. Br. at 14, 15, 16, 42 and 44. But twenty-three years after *Coffin* and four decades before the 1871 Civil Rights Act, the same Massachusetts court applied a completely different immunity standard to the same cause of action at the local level. In *Bradley v. Heath*, 12 Pick. 164 (29 Mass.) 1831, the Massachusetts Supreme Judicial Court held that a slander action could be maintained against a member of the Town of Brookline Board of Selectmen, based on a statement "spoken in open town-meeting, during an election at which the defendant was acting in his capacity as a public officer," 12 Pick. at 165, so long as the plaintiff could prove that the Selectman had acted with malice:

> If the occasion is used merely as a means of enabling the party uttering the slander to indulge his malice, and not in good faith to perform a duty or make a communication useful and beneficial to others, the occasion will furnish no excuse.

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[26] *See, Baker v. The State*, 27 Ind. 485, 489 (1867)(even where members of the city common council enjoyed discretion they would be civilly liable if "they acted corruptly"); *Vail v. Owen*, 19 Barb. 22, 26 (N.Y. 1854)(Action against assessors); *Easton v. Calendar*, 11 Wend. 90 (N.Y. 1833)("[T]hey should not be either civilly or criminally answerable if their motives are pure.").

Id. Thus the same state court that found the Massachusetts constitution's speech or debate clause granted absolute immunity from a slander action to a member of the state legislature also found that the common law protected a member of a municipal legislative body in a slander action only when he acted in good faith and did not protect him when he acted maliciously in office.

The common law's unambiguous imposition of personal liability on local legislators in slander actions [27] when they act maliciously or in bad faith is particularly instructive since such actions were the paradigm of the need for absolute state legislative immunity to protect free and uninhibited speech and to permit legislators to speak freely without fear of civil liability.[28] *Tenney*, 341 U.S. at 372-74.

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[27] A majority of the states still permit libel actions against members of local legislative bodies for remarks made during their proceedings. Prosser and Keeton on Torts, § 114(2), p. 821 (5th ed.1984). See also 3 Restatement of Torts, § 590, page 236, Comment (c) p. 237. (Absolute immunity "is not applicable to members of subordinate legislative bodies to which the State has delegated legislative powers"); Harper on Torts, 1933 Ed., § 248, p. 532 ("This protection [absolute privilege] is confined to members of state and the federal legislature, and does not extend to municipal boards or councils or town meetings"); Prosser on Torts, 1941 Ed., p. 828 ("It is generally agreed, however, that the proceedings of subordinate bodies performing a legislative function, such as municipal councils or town meetings, are not within the policy underlying such absolute immunity").

[28] This Court affirmed that view of the common law in regard to immunity in slander actions in *White v. Nichols*, 44 U.S. 266 (1845). *See also, Smith v. Higgins*, 16 Gray (82 Mass.) 251 (1860)(No liability for slanderous statement at town meeting if statement made in good faith and without malice); *McGaw v. Hamilton*, 184 Pa. 108, 113 (1898)(citing *Bradley v. Heath, supra.*)("Of course, a member of a legislative body [borough council] cannot take advantage of his official position to give expression to private slanders against others, and then claim that the words were privileged because they were spoken in the course, and as a part, of a public discussion of a pending measure."); *Greenwood v. Corbey*, 26 Neb. 449 (1889) (Absolute immunity from slander action applies to the courts and the state legislature. Members of *quasi* judicial bodies, such as a city council, have good faith immunity. "[I]n cases like that under consideration, we deem the better rule to be that communications of the kind indicated are privileged when made *bona fide*. In other words, when such communications are made against an officer in good faith, and the privilege is not abused, the officer making the charges is not liable.").

Neither the cases prior to 1871 nor the commentators shortly after 1871 support petitioners' contention that members of local legislative bodies were always entitled to absolute immunity. Petitioners rely principally on a single 1877 Mississippi decision in *Jones v. Loving*, 55 Miss. 109, 111 (1877), which holds in part:

> It certainly cannot be argued that the motives of the individual members of a legislative assembly, in voting for a particular law, can be inquired into. . . Whenever the officers of a municipal corporation are vested with legislative powers, they hold and exercise them for the public good, and are clothed with all the immunities of government, and are exempt from all liability for their mistaken use.

If the Mississippi court had indeed adopted the absolute immunity for local "officers" the petitioners suggest and thus departed from the common law distinction between ministerial and discretionary acts[29] such an abrupt change in the law in 1877 would be of no relevance to the understanding of common law immunity held by the members of the 42nd Congress in 1871. *See*, n. 19 *ante*. Further, the reasoning in the above quotation is inconsistent with present § 1983 jurisprudence. Courts in § 1983 cases routinely examine the motives of lawmakers to determine whether a law violates constitutional rights. *Washington v. Davis*, 426 U.S. 229 (1976).[30] Equally importantly, to the extent the Mississippi court found that local legislators are "clothed with" the municipality's immunity, these legislators are left naked by the modern understanding that municipalities have no immunity under § 1983. *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658 (1978).

Jones v. Loving simply is not the landmark case the petitioners suggest it is. The case merely fits into the general

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[29] That *Jones v. Loving* did not mark an about face on ministerial liability is demonstrated by Mechem, *supra.* at pp. 431-32. In his 1890 Treatise Mechem cites *Jones v. Loving* for the proposition that legislators are not liable for discretionary acts, but on the next page affirms that they are personally liable for actions in which they had no discretion.

[30] In the present case, in fact, the Court of Appeals reversed the judgment against the municipality because there was insufficient evidence of the motivation of the various members of the Fall River City Council. Pet. App. 53-63.

common law scheme that local legislators were generally not personally liable for their discretionary acts but were personally liable when they violated a requirement of law. Petitioners' misreading about *Jones v. Loving* stems from attempting to apply the twentieth century meaning of the term "legislative" powers to a nineteenth century case. The petitioners interpret the phrase "legislative powers" from the above quotation as meaning "the formulation of prospective, legislative-type policies rather than enforcement or application of existing policies." Pet. Br. 36. "Legislative," in the modern sense used by the petitioners, is the opposite of "administrative." In the nineteenth century, however, courts and the commentators used the word "legislative" to mean "discretionary," and as the opposite of "ministerial."[31] This Court recognized that nineteenth century courts used these words in exactly these senses in regard to municipal liability. In *Owen v. City of Independence*, 445 U.S. 622, 644 (1988), in discussing immunities available to municipalities, this Court noted, "The second doctrine immunized a municipality for its 'discretionary' or 'legislative'

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[31] The cases and commentators used the words "legislative," discretionary" and "judicial" virtually interchangeably, all meaning the opposite of "ministerial." For example, in *County Commissioners of Anne Arundel County v. Duckett*, 20 Md. 468, 477-78 (1863)(emphasis added), referring to an earlier case, the court said:

> In the former case, as in this, it was contended that the defendants were invested with a legislative discretion, which they had the liberty of exercising as their sense of duty to their constituents dictated, without coercion or liability for its non-user. This court did not sustain that pretension, but held the power in question to be a ministerial one, which the corporation was obliged to exercise for the public good, and in default of its proper exercise, as a common law consequence, it was liable to an action for damages.

Dillon also used the words "legislative," "judicial " and "discretionary" more or less synonymously, as was common practice at the time:

> A municipal corporation is not liable to an action for damages either for the non-exercise of, or for the manner in which in good faith it exercises, discretionary powers of a public or legislative character. . . . [L]iability attaches . . . when the duties cease to be judicial in their nature and become purely ministerial.

Municipal Corporations, v. 2, § 753, pp. 862-63. (1872).

activities, but not for those which were 'ministerial' in nature." (Emphasis added).

C. The Immunity Available to Members of Municipal Governing Bodies in 1871 Is Comparable to the Qualified Immunity Available to State Officials in § 1983 Cases Today.

The good faith immunity the common law granted members of local governing bodies is the equivalent of present day qualified immunity. Members of local governing bodies were not personally liable when they acted in good faith but were liable if they acted maliciously or in bad faith.[32] *See Bradley v. Heath*, 12 Pick. (29

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[32] The common law discretionary-ministerial act doctrine is the equivalent of having no immunity of any kind under § 1983. In *Owen v. City of Independence*, 445 U.S. at 644, this Court examined the common law "doctrine [that] immunized a municipality for its 'discretionary' or 'legislative' activities, but not for those which were 'ministerial' in nature." That "discretionary-ministerial" doctrine was insufficient to provide any shield from § 1983 liability to a city, this Court said, because cities — and presumably the members of their governing bodies — do not have discretion to violate the Constitution:

> Once again, an understanding of the rationale underlying the common law immunity for "discretionary" functions explains why that doctrine cannot serve as the foundation for a good faith immunity under § 1983. That common law doctrine merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality. But a municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second-guess the "reasonableness" of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes. . . .

445 U.S. at 649 (Emphasis added).

Members of a city council have no more discretion to violate the First Amendment, as the jury found they did in the present case, then the supervisors in *Amy* and *Farr* had to disobey court orders. Were this Court to consider only the discretionary-ministerial doctrine as a common law basis for § 1983 immunity for members of local governing bodies the Court would be compelled to draw the same conclusion about that doctrine as it reached in Owen: the doctrine does not provide

Mass.) 164 (1831), and notes 26 and 28 *ante*. In *Pierson v. Ray*, 386 U.S. 547, 557 (1967), and subsequent cases, this Court found that the common law provided similar immunity to police officers if they acted in good faith and with probable cause. This Court held that the good faith immunity the common law provided police officers was the equivalent of present day qualified immunity, saying, "the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common law action for false arrest and imprisonment, is also available to them in the action under § 1983." *Pierson v. Ray*, 386 U.S. at 557. The Court explained that reasoning in *Wyatt v. Cole*, 504 U.S. at 165 (citing *Pierson v. Ray*, 386 U.S. at 555-557), as follows, "[I]n *Pierson v. Ray* . . . we held that police officers sued for false arrest under § 1983 were entitled to the defense that they acted with probable cause and in good faith when making an arrest under a statute they reasonably believed was *valid*. We recognized this defense because peace officers were accorded protection from liability at common law if they arrested an individual in good faith, even if the innocence of such person were later established."[33]

The same reasoning used by this Court in *Pierson, Malley,* and *Wyatt* should be applied to the common law immunity ~~available~~ to local legislators. They should have a qualified immunity in § 1983 cases when "their conduct does not violate clearly established

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support for any form of immunity, qualified or absolute. The only basis for granting qualified immunity in this case is the common law history of good faith immunity in slander actions.

[33] This Court followed the same reasoning in *Malley v. Briggs*, 475 U.S. at 340-341, to find that a police officer who improperly applies for an arrest warrant is entitled to qualified immunity, not absolute immunity, based on the common law standard, in 1871, that "in cases where probable cause to arrest was lacking, a complaining witness' immunity turned on the issue of malice, which was a jury question." *Id.* 341. This Court noted that under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), qualified immunity standard "an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner." Nonetheless, this Court said, "The *Harlow* standard is specifically designed to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment,' and we believe it sufficiently serves this goal." *Id.* This Court specifically applied the *Harlow* qualified immunity standard based on the rule that common law immunity was defeated by a showing of malice.

statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. at 818. That is the present day equivalent of the standard applied by the common law in 1871 and that standard of qualified immunity "is sufficient to 'protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official immunity.'" *Buckley v. Fitzsimmons*, 509 U.S. at 268 (citing *Butz v. Economou*, 438 U.S. 478, 506 (1978)).[34]

D. The Public Policy Underlying § 1983 Would Be Better Served by Granting Members of Local Governing Bodies Qualified Immunity Rather than Absolute Immunity.

1. This Court should not give local officials greater immunity than was afforded by the common law.

If this Court finds that members of local governing bodies were not accorded absolute immunity by the common law in 1871, the Court's inquiry should end. The absence of absolute immunity prior to 1871 has been regarded by this court as dispositive where the position in question, like the level of immunity accorded to such individuals, "was known to American common law." *Burns v. Reed*, 500 U.S. 478, 493 (Emphasis in original). This Court has never granted absolute immunity under § 1983 without first finding that the common law in 1871 also provided absolute immunity for persons in the official's position or its equivalent.[35] The linchpin of this Court's

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[34] Petitioners never asserted any qualified immunity probably because they recognized that the right allegedly violated in this case was clearly established.

[35] State officials in positions that were in existence in 1871 have the burden of proving the existence of a common law immunity **at that time** that applied to their specific position. *Tenney v. Brandhove*, 341 U.S. 367 (state legislators); *Pierson v. Ray*, 386 U.S. 547 (state judges, police officers); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (state governors); *Owen v. City of Independence*, 445 U.S. 622, 637 (1980)(municipalities). When a state official seeks immunity for a position that did not exist in 1871 the Court has looked at how the common law treated analogous positions. *See Tower v. Glover*, 467 U.S. at 921 ("[I]mmunities in this country have regularly been borrowed from the English precedents, and the public defender has a reasonably close 'cousin' in the English barrister"); *Imbler v. Pachtman*, 424 U.S. 409, 423, n. 20 (1976)(Court examined the "functional comparability" of the roles of judge and prosecutor); *Hoffman v. Harris*, 511 U.S. 1060, 1062-63 (1994)

immunity decisions is that Congress is presumed not to have intended to have included in the general language of § 1983 a covert intent to alter the common law immunities prevailing in 1871. Where, as here, a form of immunity which prevailed in 1871 was the equivalent of qualified immunity, the principle that Congress did not intend to alter existing immunities applies with equal force to suggestions that the qualified immunity should be changed to absolute immunity as it does to arguments that qualified immunity should be eliminated.[36]

(Thomas, J., joined by Scalia, J., dissenting from denial of certiorari)(Noted that social workers did not exist as of 1871 and suggested that courts look for their nearest analogs in the nineteenth century.)

Obviously, city councils, boards of supervisors, boards of aldermen and similar municipal governing bodies were in existence well before 1871 and an extensive body of common law had evolved concerning the liabilities and immunities of members of such bodies. Despite petitioners' arguments that common law cases construing the immunities of members of Congress and state legislators apply with equal force to members of local governing bodies, because there was an extensive body of common law specifically concerning municipal legislators this court should look to that body of law and need not reason by analogy to state or federal legislators. As this Court said in *Imbler v. Pachtman*, 424 U.S. at 421 (emphasis added), "Our earlier decisions on § 1983 immunities were not products of judicial fiat that officials in different branches of government are differently amenable to suit under § 1983. Rather, each was predicated upon a considered inquiry into the immunity historically accorded **the relevant official** at common law and the interests behind it."

[36] Some justices have held that absent a finding that the common law in 1871 provided a state official with absolute immunity this Court can not find such immunity under § 1983 no matter how compelling the public policy reason for doing so may be. *See Burns v. Reed*, 500 U.S. 478, 498 (1991) (Scalia, J., concurring in judgment in part and dissenting in part, emphasis in original) ("While we have not thought a common law tradition (as of 1871) to be a *sufficient* condition for absolute immunity under § 1983, *see Scheuer v. Rhodes*, 416 U.S. 232 (1974), we have thought it to be a *necessary* one."); *Buckley v. Fitzsimmons*, 509 US 259, 280 (1993) (Scalia, J., concurring, citations omitted) ("[T]he presumed legislative intent not to eliminate traditional immunities is our only justification for limiting the categorical language of the statute. The policy reasons for extending protection to such conduct may seem persuasive . . . but we simply do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy."); *Hoffman v Harris*, 511 U.S. at 1062 (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) ("Where we have found that a tradition of absolute immunity did not exist as of 1871, we have refused to grant such immunity under § 1983. . . The federal courts do not have a license to establish immunities from § 1983 in the interests of what [they] judge to be sound public policy"). Similarly, *see Malley v. Briggs*, 475 U.S. at 342: ("Since [§ 1983] on its face, does not provide for any immunities, we would be going far to read into it an absolute immunity for conduct which was only accorded qualified immunity in 1871.")

2. There is no need for absolute immunity for members of local governing bodies.

Absolute immunity, this Court has said, "is 'strong medicine, justified only when the danger of [officials' being] deflected from the effective performance of their duties is very great.'" *Forrester v. White*, 484 U.S. 219, 230 (1988). Qualified immunity "represents the norm." *Malley v. Briggs*, 475 U.S. 335, 340 (1986), quoting *Harlow v. Fitzgerald*, 457 U.S. at 807. "Not surprisingly, [this Court has] been 'quite sparing' in recognizing absolute immunity for state actors in this context." *Buckley v. Fitzsimmons*, 509 U.S. at 269. The reason for this parsimoniousness in granting absolute immunity is that "to extend absolute immunity to any group of state officials is to negate *pro tanto* the very remedy which it appears Congress sought to create."[37] *Imbler v. Pachtman*, 424 U.S. at 434 (White, J., concurring).

This Court made a careful allocation of the societal costs of municipal civil rights violations in *Owen v. City of Independence*, 445 U.S. at 657:

> We believe that today's decision, together with prior precedents in this area, properly allocates these costs among the three principals in the scenario of the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity. The innocent individual who is harmed by an abuse of

[37] In speaking of high officials this Court often notes that "[n]o man in this country is so high that he is above the law," *Butz v. Economou*, 438 U.S. 478, 506 (1978); *Nixon v. Fitzgerald*, 457 U.S. 731, 758 (1982); *Clinton v. Jones*, U.S. (1997); *Gravel v. United States*, 408 U.S. 606, 615 (1972). If all members of local governing bodies were absolutely exempted from liability for intentionally violating the constitution an asterisk would have to be added saying, "except for 350,000 people."

> governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.

In contrast to this Court's formulation, Petitioners' proposed allocation would leave "[t]he offending official" secure in the knowledge that no matter how much he chooses to abuse his governmental power to strike at his enemies, he can never be held financially responsible, and thus leave "[t]he innocent individual who is harmed by an abuse of governmental authority" with no compensation or, at best, would leave taxpayers picking up the bill for intentional illegal conduct if the wrongdoer is sufficiently highly situated in local government. This result does not further the historical purpose of § 1983.[38]

Petitioners contend that creation of absolute immunity is desirable because it would protect local officials from the time and effort involved in defending lawsuits (Pet. Br. 12, 16, 34), would

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[38] Because absolute immunity matters only when qualified immunity would be unavailable, this shift in financial responsibility occurs only in cases, such as those involving intentional racial discrimination, in which the city officials in question knew or should reasonably have known that they were violating federal law. It seems inappropriate for federal law to mandate in such cases that financial responsibility should fall on the city rather than on the culpable individuals. Were federal law construed to provide qualified immunity in cases such as this, the city or county involved could always choose to indemnify an official against whom damages were awarded because he had violated clearly established constitutional norms. Thus as a practical matter the absence of absolute immunity would matter to the official and city or county only in those cases in which the government body would have chosen not to provide indemnification. That is a choice which should be left to the government body and state at issue. *Johnson v. Fankell*, U.S. , 117 S. Ct. 1800 (1997).

reduce the risk that fear of litigation might improperly skew their decisions (Pet. Br. 16), and would assure that responsible individuals are not deterred from holding the positions in question. (Pet. Br. 17). All of these purposes, however, are among the goals advanced by qualified immunity. *Butz v. Economou*, 438 U.S. 478 (skewed official decisions), *Wood v. Strickland*, 420 U.S. 308 (skewed official decisions, deterrence from government service); *Harlow v. Fitzgerald, 457* U.S. 800. (time and effort of litigation). In *Harlow* this Court "completely reformulated qualified immunity . . . to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment, and we believe it sufficiently serves this goal.'" *Burns v. Reed*, 500 U.S. at 494-95 n. 8. This Court has already determined that qualified immunity is sufficient to meet all those concerns.

Petitioners recite a catalog of ills that will befall local governments if they do not have absolute immunity. Pet. Br. 15-18. History, however, is dispositive of and fatal to any contention that the absence of absolute immunity for local legislative actions would cause serious and widespread problems for the effective operation of local government. Qualified immunity or its common law equivalent were the controlling legal standard for large periods of time, without any identifiable ill effects during those periods. Under state law only qualified immunity was accorded to local legislative officials prior to and well after 1871. This pattern was, until recently, widely followed in the federal courts in § 1983 litigation. Only in the 1980s did the lower courts begin granting absolute immunity to local officials. In the absence of any evidence that exposure to such liability in all the years prior to 1980 did in fact produce serious consequences for municipalities, there is simply no basis on which to conclude that in the absence of a special federal absolute immunity rule "the danger of [officials' being] deflect[ed from the effective performance of their duties] is very great." *Forrester v. White*, 484 U.S. at 230. Rather than being permitted to speculate about what might happen without absolute immunity, petitioners should be compelled to demonstrate what harm actually did happen before absolute immunity. If anything the volume of recent cases in which courts have attempted to apply their various formulations concerning absolute immunity demonstrate how local officials can now have no

clear idea of when they are immune and when they are not immune from liability.

One of petitioners' major policy reasons for extending absolute liability to members of municipal governing bodies is an assertion that fear that their personal financial exposure would influence the public decisions of these officials. Pet. Br. 16. Forty-six states, however, have statutes either permitting or requiring indemnification of municipal employees in civil rights actions. Those statutes are listed in Appendix A. The almost unanimous enactment of indemnification statutes and the variety of choices the states have made about indemnification of public officials in civil rights actions shows that the states have given great thought to whether local officials should bear the burden of their own wrongdoing. These decisions should be left to the states and local governments, who after all, would be paying the judgments. Additionally, where an indemnification statute is insufficient and municipal decision makers feel that the risk of personal liability is inhibiting their freedom of action, they can have the municipality purchase private insurance.

3. No workable rule can be created that would give clear guidance to local officials as to when their conduct would be administrative and when it would be legislative.

Local governments are inherently different from state and federal governments. State governments mirror the separation of powers of the federal government, with separate and distinct executive, judicial and legislative branches. At the state and federal levels the policy of separation of powers, which is at historical foundation of legislative immunity, *Tenney v. Brandhove*, 341 U.S. at 372-75, is well served by legislative immunity. Legislative immunity is protected by the federal constitution and virtually every state constitution.[39] In more than 200 years courts have been called on to determine whether conduct by a Congressman or a member of a state legislature has been legislative or executive in only a handful

[39] No state constitution extends legislative immunity beyond the state legislative level, however.

of cases. By the nature of the doctrine of separation of powers, Congressmen and state legislators have few, if any, executive governmental functions.

Municipal governments in this nation present no such uniform picture.[40] In New England many towns are run by town meetings in which every resident is a legislator and the executive function is in the hands of multi-member boards of selectmen, which, however, function in both legislative and executive capacities between town meetings. Boards of selectmen and boards of commissioners, being multi-member entities, must discuss, deliberate and vote on every decision. Their actions have some of the appearances and forms of legislative activities, even when they are deciding on the most mundane of executive issues, such as the hiring of a single employee. In contrast to New England town meetings, where the legislature is as large as the adult population, some Southern counties have granted the totality of legislative power to a single county commissioner, who simultaneously has the totality of the executive power. *See*, *Holder v. Hall*, 512 U.S. 874 (1994).[41] Others grant combined executive and legislative power to a multi-member commission. *City of Mobile v. Bolden*, 446 U.S. 55 (1980);[42] *Brown v. Board of Education*, 347 U.S. 483, 639, n. 19 (1955). Some cities, such as Fall River in the present case, have a mayor separate from the city council, with the power to introduce and veto

[40] There are 84,955 units of local government in the United States. Of these, 38,978 are general-purpose local governments — 3,043 county governments and 39,935 subcounty general-purpose governments (including 19,279 municipal governments and 16,656 town or township governments). The remainder, more than half the total number, are special-purpose local governments, including 14,422 school district governments and 31,555 special district governments. 1992 Census, *supra*. p. vii. The Bureau of the Census lists nine different forms of local governments, plus "other." *Id.* p. B-2.

[41] "[T]he Bleckley County Commissioner performs all of the executive and legislative functions of the county government, including the levying of general and special taxes, the directing and controlling of all county property, and the settling of all claims. Ga. Code Ann. § 36-5-22.1 (1993). In addition to Bleckley County, about 10 other Georgia counties use the single commissioner system; the rest have multimember commissions." 512 U.S. at 876-77.

[42] "The three Commissioners jointly exercise all legislative, executive, and administrative power in the municipality." 446 U.S. at 59.

legislation but not to vote. Pet. Br. 3-4. In some cities the mayor is a member of the council and votes with other members. *Spallone v. United States*, 403 U.S. at 269.[43] Often multi-member entities are created for the primary if not exclusive purpose of administration. Some multi-member bodies can take action regarding essentially any local issue, while others are restricted to specific topics, such as zoning, schools, tax assessments, or the conduct of elections. The same body that may be elective in one city might be appointed in another. Under these circumstances, it would be imprudent to set about creating some sort of federal common law doctrine attempting to define which local government bodies are "local legislative bodies."

Efforts to create such artificial distinctions regarding local governments in the past have left chaos and confusion among the courts.[44] Similarly, efforts by the lower courts to create formulae to distinguish "legislative" acts from "administrative" ones have created a smorgasbord of theories and results.[45] Rules based on specific

[43]"Under the Charter of the city of Yonkers, all legislative powers are vested in the city council, which consists of an elected mayor and six council members." *Id.*

[44]*In Owen v. City of Independence*, 445 U.S. at 644, n. 26, this Court referred to the "`nongovernmental'-`governmental' quagmire that has long plagued the law of municipal corporations: A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious, and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound."

. Similarly, this Court noted the confusion caused by efforts to apply the discretionary-ministerial distinction.:"Like the governmental/proprietary distinction, a clear line between the municipality's 'discretionary' and 'ministerial' functions was often hard to discern, a difficulty which has been mirrored in the federal courts' attempts to draw a similar distinction under the Federal Tort Claims Act, 28 U.S.C. § 2680(a). *See generally* 3 K. Davis, Administrative Law Treatise § 25.08 (1958 and Supp. 1970)." *Id.* 648, n. 31.

[45] See, *Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984) (articulating two part test focusing on nature of underlying facts used to reach a decision and nature of impact of decision); *Ryan v. Burlington County, NJ*, 889 F.2d 1286, 1290 (3rd Cir. 1989) (actions must be both substantively and procedurally legislative); *Alexander v. Holden*, 66 F.3d 62, 66-67 (4th Cir. 1995) (adopting two part test focusing on general or specific nature of underlying facts relied on in decision making process and general or specific nature of impact); *Hughes v. Tarrant*

conduct, i.e. a rule that voting is per se legislative[46] might work in a purely legislative body with no executive powers, but cannot work with a multi-member executive, such as a board of commissioners, where every clearly executive decision must be decided by a vote. Voting as a test of legislative function obviously would not work where the entire legislative power is delegated to a single county commissioner.

This Court should hesitate before establishing a rule that will revive these unsuccessful legal experiments. This Court should recognize that at the local level there is no workable method of untangling the "legislative" from the "administrative" in a potpourri of governmental schemes specifically designed to blend these functions. Asking the lower courts to separate the "legislative" from the "administrative" in local governments would be like trying to separate the spots from the leopard. The insurmountable difficulties in creating a workable method of differentiating activities that would be protected by absolute legislative immunity from activities that

County, Tex., 948 F.2d 918, 921 (5th Cir. 1991) (applying test of whether facts relied on were general, legislative facts or specific facts related to broad policy to individual situation); *Haskell v. Washington Township*, 864 F.2d 1266 (6th Cir. 1988) (Zoning ordinance singled out individual and was thus administrative, legislative immunity is absolute, except for bad faith or when not "in furtherance of a reasonably ascertainable legislative activity"); *O'Brien v. City of Greers Ferry*, 873 F.2d 1115, 1119 (8th Cir. 1989) (legislative act involves a formulation of policy governing future conduct of all or a class of the citizenry); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 580 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985) (distinguishing between the formulation and the application of policy); *Smith v. Lomax*, 45 F.3d 402, 405-06 (11th Cir. 1995) (vote by members of county board not to reappoint plaintiff as board clerk did not constitute broad, general policy making and therefore the members were not protected by legislative immunity); *Gross v. Winter*, 876 F.2d 165 (D.C. Cir. 1989) (applies functional approach to determine whether employment action was "legislative" or "administrative," looking at the nature of the conduct of the official). *c.f., Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir.), *cert. denied*, 479 U.S. 996 (1986) (functional test looks to function of the fired employee to determine whether the employee's function was "directly related to the due functioning of the legislative process"))

[46] *See Abraham v. Peharski*, 728 F.2d 167 (3rd Cir. 1984), cert. den. 467 U.S. 1242; *Roberson v. Mullins*, 29 F.3d 132 (4th Cir. 1994).

would be protected by qualified executive immunity is reason enough to uniformly grant qualified immunity to all officials.

4. Experience shows that absolute immunity is most frequently asserted in defense of actions affecting single individuals or businesses.

An examination of § 1983 cases against members of local governing bodies shows that overall the conduct that preceded such litigation has not involved "rules of general application . . . statutory in character . . . [that] act not on [particular] parties . . . [that] do not arise out of a controversy . . . but instead out of a need to regulate conduct for the protection of all citizens," this Court's description of "legislative" actions. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731 (1980). In the vast majority of the reported cases, as here, the litigation concerned actions which arose out of a single controversy and affected, and were directed at, only a handful of particular individuals, and involved no rule of general application.

Most of these cases in which local officials asserted absolute legislative immunity fall into the following categories: (1) Actions directed at particular employees. Most of these cases, as here, involved ordinances or similar measures directed at a single individual; the most common phenomenon, as here, is the enactment of an ordinance to dismiss a specific individual by eliminating his or her job. Appendix B. (2) Race based actions. Appendix C. (3) Speech based actions. Appendix D. (4) Other instances of actions directed at a particular person or controversy, such as a refusal to allow the holding of a concert. Appendix E. *See Newport v. Fact Concerts*, 453 U.S. 247 (1981). (5) Ordinances or resolutions which, although framed in general terms, were in fact directed at and applied to one person or entity. Appendix F. (6). Permit or land use decisions regarding one specific plot of land. These include both the impositions of new restrictions on a specific parcel of land and refusals to grant some form of license or permit in a particular instance. Appendix G. (7) Denials of licenses or permits to particular individuals or business. Appendix H.

These cases show that while decisions regarding specific public jobs, the use of particular land parcels, or the issuance of licenses and permits, are almost never dealt with by state legislatures or Congress, they are grist for the local government mill. The experience of the past twenty years, during which the lower courts' views on absolute local legislative immunity have virtually reversed, demonstrates that in the vast majority of cases in which absolute immunity has been asserted at the local level, the action in question could have been — and in many localities would have been — taken by an administrative official. These cases simply do not often arise from general legislation, affecting the population as a whole.

5. The Possibility of Relief Against the Municipality is an Inadequate Remedy.

Petitioners suggest that "individuals who believe their civil rights have been violated by the enactment of unconstitutional legislation may pursue remedies against the municipality itself," Pet. Br. 28, and therefore plaintiffs will not be totally denied a remedy by allowing legislators absolute immunity. This very case belies that suggestion. Since the Court of Appeals held that the plaintiff presented insufficient evidence of the individual motivations of the members of the Fall River City Council to support a judgment against the city, Janet Scott-Harris will be left without a remedy if the individual defendants have absolute immunity.

These facts are far from unique. Proving a single individual's improper motivation is much simpler than proving the motivation of an entire municipal governing board.[47] If individuals are absolutely immune from § 1983 liability Janet Scott-Harris will certainly not be the only person whose rights are violated by government action who will have no relief in the courts.

Additionally, punitive damages would not be available against the municipality. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). Punitive damages serve important purposes. This

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[47] "[P]roof that a municipality's legislative body or authorized decisionmaker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably." *Bd. of County Commissioners of Bryan County, Oklahoma v. Brown*, 117 S.Ct. 1382, *reh'g. denied* 117 S.Ct. 2472 (1997).

Court justified its decision in *City of Newport*, denying punitive damages against municipalities, by emphasizing their availability against individual defendants.[48] It would be ironic if this Court denied punitive damages against municipalities when their official policy violates clearly established rights because of the availability of a punitive damages award against individual offenders, and then the Court granted absolute immunity to those very same municipal policy makers.

Offering years of costly litigation is not a viable alternative to preventing the violation in the first place. As this Court said in *Ford Motor Co. v. Equal Employment Opportunity Commission*, 458 U.S. 219, 221 (1982), "The claimant cannot afford to stand aside while the wheels of justice grind slowly toward the ultimate resolution of the lawsuit. The claimant needs work that will feed a family and restore self-respect. A job is needed — now." The law should deter violations from happening in the first place, not just offer the prospect of years of litigation after the fact.

6. Resort to the ballot box is not a viable alternative.

Petitioners also suggest that "[c]onstituents who are dissatisfied with the manner in which [officials] exercise their authority may always resort to the ballot box." Pet. Br. 28. Such a suggestion is far removed from reality. Practical experience demonstrates that in most instances involving assertions of absolute immunity at the local level the action in question was directed at only a single individual or business.

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[48] 453 U.S. at 269-70. "Moreover, there is available a more effective means of deterrence. By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute directly advances the public's interest in preventing repeated constitutional deprivations. In our view, this provides sufficient protection against the prospect that a public official may commit recurrent constitutional violations by reason of his office. The Court previously has found, with respect to such violations, that a damages remedy recoverable against individuals is more effective as a deterrent than the threat of damages against a government employer. *Carlson v. Green*, 446 U.S. [14 (1980)] at 21." The converse is also true, the absence of any personal financial exposure should embolden local officials weighing the risks of violating constitutional mandates.

A fundamental purpose of § 1983 is to protect minorities from the political strength of the majority.[49] Petitioners place far too heavy a burden on an African-American woman in an overwhelmingly white city to expect that she would have enough political power at the next city council election to make her dismissal a significant issue. Persons fired from their jobs have more important tasks to face than organizing electoral revenge. It is unrealistic to expect powerful politicians will have much to fear at the ballot box from individual members of minority groups who are singled out for unconstitutional treatment.

7. Granting absolute immunity to local officials would open the door to abuse of the privilege.

Extending liability-free authority to violate the civil rights laws to nearly 350,000 people — people who have the closest daily contact with citizens and who generate by far the most civil rights litigation — would go a long way toward eviscerating § 1983. Before taking such a step the Court should consider who would be protected by absolute immunity who would not have been protected by qualified immunity. As this Court said in *Burns v. Reed*, 500 U.S. at 494-95 (emphasis added), *citing Malley v. Briggs*, 475 U.S. at 341, "As the qualified immunity defense has evolved, it provides ample support to all but the plainly incompetent or those who knowingly violate the law." Should such persons contemplate taking a clearly unconstitutional action, absolute immunity would encourage them, fear of personal liability would give them pause. "Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate. . ." *Harlow v. Fitzgerald*, 457 U.S. at 819, with emphasis added by the Court in *Mitchell v. Forsyth*, 472 U.S. at 524. This Court noted in *Owen v. City of Independence*, 445 U.S. at 656, "Whatever other concerns should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals who will be affected by his actions. To criticize section 1983 liability because it leads

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[49] African-Americans make up approximately 1 percent of the population of Fall River. See n. 1 *ante*.

decisionmakers to avoid the infringement of constitutional rights is to criticize one of the statute's *raisons d'etre.*"

II. THE ACTIONS AT ISSUE IN THIS CASE ARE NOT "LEGISLATIVE."

Even if absolute immunity is available for the legitimate legislative acts of local officials, the conduct at issue in this case falls outside any such protection. If petitioners' conduct is cosidered legislative for immunity purposes, in light of the jury's conclusions, then legislative immunity would become a cloak for lawlessness.[50] Soon after the lower courts began holding that local legislators had absolute immunity those courts began to see cases in which local officials used their immunity to serve their political ends.[51] In

[50]The First Circuit and several other courts of appeal, see note 45 *ante*., analyze whether the facts on which legislation at issue were based are "legislative facts," meaning "generalizations concerning a policy or state of affairs." *See* Pet. App. at 64, *citing Cutting v. Mazzey*, 724 F.2d 259, 261 (1st Cir. 1984). In some cases, such as the present one, this inquiry requires a factual determination by the jury as to the motivation of the persons who enacted the ordinance. If, for example, petitioners' roles in passing the ordinance were based on financial concerns and an intention to reorganize city government, then these would be "legislative facts" and their conduct could be considered "legislative." If, as the jury found, they were motivated by a desire to retaliate against respondent because of her constitutionally protected speech, then their conduct would not be considered "legislative" because it was aimed at a particular individual and was not based on legitimate legislative interests. See *Doe v. McMillan*, 412 U.S. 306, 328 (1973)(Douglas, J. concurring, emphasis in the original)("*Violations of the commands of the First Amendment are not within the scope of a legitimate legislative purpose*"); *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 447 (1985)(citing *United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973))("[S]ome objectives — such as 'a bare . . . desire to harm a politically unpopular group,' 413 U.S. at 534 — are not legitimate state interests"). That analysis is the short answer to the question of whether the conduct in this case was "legislative." Since the jury found the petitioners' conduct did not involve any legitimate legislative activity, they have no legislative immunity.

[51] As examples of the conduct faced by the lower courts *see Burtnik v. McLean*, 76 F.3d 611 (4th Cir. 1996)(Board simultaneously abolished job of white, Jewish worker and created new job with similar responsibilities then filled with non-Jewish new employee); *Carver v. Foerster*, 102 F.3d 96, 98 (3d Cir. 1996)(Plaintiffs fired on January 3; resolution eliminating their jobs not proposed until January 8, passed on January 16); *Alexander v. Holden*, 66 F.3d 62,63 (4th Cir. 1995)(After

Supreme Court of Virginia v. Consumers Union, 446 U.S. at 731, this Court held the regulations at issue were "legislative" because they were "rules of general application . . . statutory in character . . . [that] act not on [particular] parties . . . [that] do not arise out of a controversy . . . but instead out of a need to regulate conduct for the protection of all citizens." Conversely, as this Court stressed in *Forrester v. White*, 484 U.S. at 228, an action cannot be characterized as inherently judicial, or inherently legislative, if it could just as readily have been done by an administrative official. 484 U.S. at 228. Judged by those standards this is not a close case. The ordinance abolishing respondent's job can hardly be characterized as "a rule of general application;" it can hardly be called a rule at all. The mayor admitted he could have saved the exact same amount of money by firing her on his own as by having the city council do it.[52] Petitioners concede that absolute legislative immunity would have been unavailable if they had adopted a resolution simply dismissing respondent.[53]

abolishing salary for Clerk, thus effectively dismissing Democratic employee, Republican-controlled board then created a new Secretary-Clerk position with same responsibilities and appointed a prominent Republican); *Orange v. County of Suffolk*, 830 F. Supp 701 (E.D.N.Y. 1993)(Proposal to eliminate 16 positions allegedly for partisan reasons; position of one employee removed from list when he joined Republican Party and made $15,00 contribution; three Republicans whose positions were eliminated all given other jobs, non-Republicans demoted or fired); *Baker v. Mayor and City Council of Baltimore*, 894 F.2d 679, 680-80 (4th Cir. 1990)(Resolution abolishing plaintiff's position but creating a new differently titled position with similar responsibilities); *Bryant v. Nichols*, 712 F.Supp 887 (M.D. Ala. 1989)(After demoting plaintiff, mayor asked city council to vote to endorse his actions); *Rateree V. Rockett*, 630 F.Supp 763 (N.D. Ill 1986)(Council repeatedly abolished whatever jobs alleged political opponents were appointed to); *Aitchison v. Raffiani*, 708 F.2d 96 (3d. Cir. 1983)(Ordinance abolishing plaintiff's job held to be in bad faith serving as a subterfuge to avoid the civil service hearing process).

[52] Mayor Bogan admitted he had statutory authority to do so under Mass. G.L. c. 43 § 54. *See* Tr. Trans. 6:67, Trial Ex. 85

[53] "Termination of employee without eliminating position . . . is not shielded by absolute immunity doctrine . . . . decision to hire or fire [is] generally considered administrative." (Pet. Br. 38-39). This concession is compelled by this Court's decision in *Forrester v. White*, 484 U.S. 219, which held that the dismissal of a judicial employee by a judge was not protected by absolute judicial immunity. Thus there would be no possible claim of legislative immunity if a city council

Petitioners argue that an action is "quintessentially legislative," if it involves budget making or the expenditure of funds, with no reference to the motivation for enacting the ordinance. Pet. Br. 36. In this view absolute immunity attaches to any action regarding the expenditure of governmental funds, such as ordinances reading:

> "No city funds shall be used to pay the salary of Janet Scott-Harris,"
>
> "No city funds shall be expended to teach Hispanic students in majority white schools,"
>
> "No city funds shall be expended to arrest, jail or prosecute arsonists who set fire to black churches."

It is inconceivable that city officials could escape liability under § 1983 in this manner. Judge White, in *Forrester v. White*, surely would not have been entitled to absolute immunity if, instead of firing Cynthia Forrester, he had refused to allocate funds for her position, spending them instead on a new employee doing similar work. If local officials could obtain absolute immunity merely by recasting a directive as a budgetary matter, only the most inept miscreants would fail to acquire such immunity for even the most blatant violations of clearly established constitutional norms.

Further, would budget making remain quintessentially legislative if done by an executive? Executive and judicial officials at all levels of state and local governments routinely make budgetary decisions allocating funds to or from specific purposes, ranging from purchases of several hundred dollars to projects costing billions. A decision by Washington Metro executives to reduce expenditures by closing the trains at 11 p.m. rather than midnight would involve far more money than was at stake in the instant case. If the mere fact that a decision was about, or affected, the expenditure of funds rendered it "quintessentially legislative," much of the work of executive officials would fall within that definition.[54]

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adopted an ordinance stating "Janet Scott-Harris is hereby dismissed" or "The Mayor shall immediately dismiss all city employees who are African-American."

[54] Since legislative immunity analysis "looks to the nature of the function performed, not the identity of the actor who performed it," *Buckley v. Fitzsimmons*, 509 U.S. at 269, under Petitioners' formulation any official involved in "[o]rdering

Petitioners urge, in the alternative, that any decision that eliminates a specific government job, rather than a specific government employee, is necessarily legislative. (Pet. Br. 33, 38, 39-40). Again, however, executive officials routinely take such action. Shortly after taking office President Clinton eliminated a substantial number of White House staff positions. Would petitioners label his conduct in doing so as "legislative"? Judge White would not have been entitled to absolute immunity if, instead of firing Forrester, he had for the purpose of getting rid of her simply abolished the position of Project Supervisor of the Jersey County Juvenile Court Intake and Referral Services Project. *Forrester v. White*, 484 U.S. at 221. Were such a scheme sufficient to acquire constitutional immunity, no liability would attach for approving an ordinance reading:

> "All jobs held by Catholics are hereby eliminated."
>
> "The position of assistant secretary of the Mayor will be abolished as of January 1, 1998, unless the person now occupying that position agrees to have sexual relations with the Mayor."

If § 1983 permitted such schemes, that statute would constitute a manual of techniques for violating those rights with impunity, not a measure to remedy violations of federal constitutional rights.

Petitioners contend, third, that local legislators' motives for enacting "facially neutral" ordinances can not be considered in determining whether their conduct was legitimate legislative activity. (Pet. Br. 31-32). In this view absolute immunity would attach to measures such as:

> "Linda Brown may not attend Sumner Elementary School."[55]
>
> "Louis and Fern Shelley may not reside in the house previously owned by J.D. and Ethel Kramer."

In petitioner's view, absolute legislative immunity from the 1871 Ku Klux Klan Act would attach even though the city council members wore white robes and hoods and openly proclaimed that their intent

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budget priorities," Pet. Br. 36, should be entitled to absolute legislative immunity, not just members of "legislative" bodies. Such a formulation would leave few public officials responsible for § 1983 violations.

[55] Richard Kluger, "Simple Justice," Vol. 1, p. 515 (1975).

was to "fire every Jew," to "dismiss Scott-Harris because African-Americans should not object to racist remarks" or "to preserve segregation now and forever." Petitioners argue that it would be unthinkable for a federal court to inquire into the motives of a state or local legislator. (Pet. Br. 32 and n. 12). But this Court routinely engages in precisely such inquiries to determine whether a state law was adopted for a constitutionally impermissible racial purpose. *Washington v. Davis*, 426 U.S. 229. The directive dismissing Cynthia Forrester was presumably facially neutral; in ruling that judges do not enjoy absolute immunity for dismissing their employees, this Court in *Forrester v. White* necessarily held that the lower courts could inquire into Judge White's motives to ascertain whether he had acted with a covert intent to discriminate on the basis of sex. *See also*, *Davis v. Passman*, 442 U.S. 228 (1979). The resolution of the merits of discrimination claims invariably requires the trier of fact to ascertain whether the facially neutral justification proffered by the defendant for the disputed action is in fact a pretext. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). Surely the mere assertion of such a pretext, or of a particular type of pretext such as saving money, cannot entitle a defendant to absolute immunity, without regard to whether that assertion is factually false.

III. PETITIONERS' CONDUCT WAS THE PROXIMATE CAUSE OF PLAINTIFF'S LOSS OF EMPLOYMENT.

A. Petitioners failed to preserve their appellate rights as to their proximate cause argument.

Petitioners present an argument concerning proximate causation that they first made following the decision by the First Circuit Court of Appeals in their Joint Petition for rehearing. Petitioners now argue that there was insufficient evidence, indeed no

evidence at all, that their actions caused respondent's dismissal.[56] This argument is unavailing.

Both the Federal Rules of Civil Procedure and the Seventh Amendment require a litigant wishing to object to the sufficiency of the evidence at trial to do so in a timely manner before the matter is submitted to the jury and again after the verdict. Neither party filed either a motion for a directed verdict or for judgment n.o.v. on the same proximate cause ground now advanced in this Court.[57]

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[56] "There was *no* evidence introduced that either of the individual defendants made any ongoing or improper efforts to induce other Councillors to act for illicit or impermissible reasons. " Pet. Br. 46-47 (Emphasis in original). Similarly they argue that "[t]here was no evidence that either Bogan or Roderick helped shape or exercised any influence over the other City Councilors' decision to vote in favor of the position-elimination ordinance." Pet. Br. 48. Not only are these statements factually inaccurate, but the Supreme Court is the wrong venue to first raise this specific argument on the sufficiency of the evidence at trial. Even now, Petitioners make this argument on the sufficiency of the evidence without a single reference to the trial transcript, in effect asking this Court to read the entire record.

[57] The closest Roderick came to the issue of proximate cause in her directed verdict motion was to state that "there is insufficient evidence upon which a jury would be warranted in finding that the elimination of the position of Administrator, Health & Human Services, was a proximate cause of injury or damages to the plaintiff." (App. 135, emphasis added). She did not argue that her own conduct was not a proximate cause of the city council's action, the issue she raises in this Court. The record is even less supportive of Bogan. The docket (App. 18) shows motions for directed verdicts filed by the defendants Roderick (No. 68) and Fall River (No. 67) immediately after the plaintiff's opening statement, but not by Bogan. The docket shows both motions denied on 5/16/94. (App.20).

The docket shows no written directed verdict motions filed by Bogan either at the close of the plaintiff's case or at the close of the evidence. The Appendix in this Court includes written directed verdict motions on behalf of Fall River (App. 129) and Roderick (App. 133) but not for Bogan. The Court of Appeals Appendix similarly includes directed verdict motions by Fall River and Roderick but not Bogan. The docket shows an entry for 5/24/94 "motions to dismiss ans (sic) for directed verdict; hearing on record; ALLOWED on def. Robert Connors; DENIED on other 2 defts Bogan and Roderick. (App. 22). The trial transcript for that day, the "hearing on the record," (Trial Trans.7:20-25) includes only the following:

MR. FULTON: Your Honor, the City of Fall River has a Motion for Directed Verdict that I want to file.

MR. ASSAD: Judge, on behalf of Marilyn Roderick and Connors, we would renew the motion that we have submitted to you at the close of the opening for a directed verdict.

Neither party raised this same factual contention in their Court of Appeals brief.[58] The Seventh Amendment precludes this Court from entertaining this fact-bound argument.

Proximate cause is normally a fact question.[59] In the present case, the jury was instructed, without objection, on proximate cause

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MR. MARCHAND: On behalf of Daniel Bogan, I make the same request.

The judge's response was to allude to an off-the-record conference the prior day. *See* Trial Trans 7:20. She then said, "With respect to the other defendants [besides Connors], I deny the Motion for Directed Verdict, but I will re-examine again at the close of the case this whole issue of legislative immunity. . . ."

Counsel for all three defendants orally renewed their directed verdict motions at the close of the evidence, without argument. (Ct. of Appeals App. 988-89). The result is that there is no record of Bogan having filed any written directed verdict motions. There is no record of the substance of Bogan's oral directed verdict motion, except that his counsel said he renewed the motion made after the opening, of which there is no record.

Bogan (App. 161) and Roderick (App.159) filed motions for judgment notwithstanding the verdict. Bogan's J.N.O.V. motion simply states that he moves for judgment "on the grounds set forth in its (sic) motions for directed verdict made at trial." Roderick's motion states as grounds "the grounds set forth in her motions for directed verdict made at trial and on the ground that Marilyn Roderick is entitled to absolute immunity." *See also,* District Court Memorandum of Decision and Order on Defendant' Motions for Judgment Notwithstanding the Verdict. (App. to Petition, App. 15-16).(Nowhere in her listing of the issues raised by the directed verdict motions — or anywhere else in her Memorandum and Order — does the trial judge mention the words "proximate cause.")

Based on this trial record there is no evidence that Bogan or Roderick preserved the issue of whether the evidence was sufficient to prove their conduct was a proximate cause of the elimination of the plaintiff's employment, either at the close of the plaintiff's evidence or at the close of all the evidence.

[58] Roderick did raise that issue, but only in regard to herself, Consolidated Brief of the Defendants-Appellants p. 82-3, and without citing any authorities and only to the extent of saying that since the position elimination ordinance passed by a vote of 6 to 2, even if she would have voted against the ordinance it would have passed. Her present proximate cause argument is completely different. Their present proximate cause argument, in a different form, was first raised in their Joint Petition for Rehearing in the Court of Appeals, after new counsel had appeared.

[59] *See, Exxon Company, U.S.A. v. Sorec, Inc.*, 116 S. Ct. 1813 (1996)("The issues of proximate causation and superceding cause involve application of law to fact, which is left to the factfinder, subject to limited review. *See, e.g., Milwaukee & St. Paul R. Co. v. Kellogg*, 94 U.S. 469, 473-476 (1877); [W.] Keeton, Prosser and Keeton on Torts 320-321 [5th ed. 1984]; 5 [A.] Corbin, [Corbin on Contracts] § 998 at 22-23 [1964]."

as to each defendant.[60] The jury answered specific, separate interrogatories on causation. App. 151-52. Petitioners did not object to either the jury instructions or the jury interrogatories at trial or on appeal. Petitioners' failure to object should bar them from raising this issue at this point.[61] Fed. R. Civ. P. 51. *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987).

The evidence is more than sufficient to support the jury verdict. Mayor Bogan framed and proposed the resolution that eliminated the respondent's job. It would be entirely normal for the city council to approve an ordinance submitted for approval by the mayor. Petitioner Roderick chaired the city council ordinance committee that approved this proposal and then referred it with approval to the full council. Such committees are delegated primary responsibility to review proposed ordinances and to recommend passage or rejection to the council. Petitioners certainly offered no evidence that the council's action would have happened in any event even if the mayor had not requested it or if Roderick had not approved the proposal and recommended that it be passed by the city council.

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[60] Judge Saris' detailed jury instruction on causation is at pages 212 and 213 of the Appendix. Further, Judge Saris instructed the jury that "there are three separate defendants here, as I mentioned before. So that you must make a separate determination under the law with respect to each one separately." (App. 204).

[61] Petitioners waived their present argument by agreeing to the form of the jury interrogatories. These interrogatories are totally objective; did Act A cause Result B? They did not ask the jury to consider whether Bogan's and Roderick's "allegedly improper motivations" were "infused" into "the deliberative and collective decision making process," the legal standard they now assert. Pet. Br. 45. They did not ask the jury to find whether the city council members were "mere conduits for the defendants' unlawful motivations because they directly relied upon the individual defendants' improper information," Pet. Br. 46, a factual finding they now say is a legal prerequisite to liability. We don't know if the jury believed the council members relied on Bogan and Roderick because Petitioners never requested that the jury be asked to decide that.

B. Applying general tort principles of causation, since the elimination of plaintiff's position was a foreseeable and expected result of the petitioners' conduct, that conduct was the proximate cause of plaintiff's injuries.

Petitioners ask this Court to find that by submitting their scheme to remove the plaintiff from city government to the City Council, which they say was innocent of their evil motives, their bad intentions were bathed away.[62] The novelty of this argument is demonstrated by Petitioners' failure to cite a single authority for their proposition that they could not "have been the *proximate* cause of any *actionable* injury to Scott-Harris under these circumstances." Pet. Br. 48-49 (Emphasis in original).[63]

This contention ignores basic tort notions of proximate causation. Petitioners do not deny that the evidence was sufficient to find they conceived a plan to remove Janet Scott-Harris from Fall River City Hall, that they set that plan in motion, and that their plan proceeded exactly as anticipated, and ultimately succeeded. Petitioners contend, in effect, that because they could not complete their plan without the help of innocent third parties, they are legally entitled to a share of that innocence.

In a similar situation in *Malley v. Briggs*, 475 U.S. 335, a district court had found that the conduct of a magistrate in issuing arrest warrants based on false affidavits by a police officer "broke the causal chain between [the police officer]'s filing of a complaint and respondents' arrest." 475 U.S. at 339. This Court rejected that finding, saying, "It should be clear, however, that the District Court's 'no causation' rationale in this case is inconsistent with our

[62] This Court rejected that notion in a similar context. In *Dennis v Sparks*, 449 U.S. 24, 27 (1980), this Court held that a private corporation that conspired with a state judge can be liable under § 1983 even though the judge himself has absolute immunity and even though the harm could not have been inflicted but for the judge's actions.

[63] Their sole citation to dicta in *Douglas v. Jeannette*, 319 U.S. 157, 165 (1942), does not even approach their position.

interpretation of § 1983. As we stated in *Monroe v. Pape*, 365 U.S. 167, 187 (1961), § 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.' Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read § 1983 as recognizing the same causal link." 475 U.S. at 345 n. 7. *Malley* should be contrasted with *Martinez v. California*, 444 U.S. 277, 285 (1980), a § 1983 action in which the Court held that a murder committed by a sex offender five months after his release on parole was too remote to impose liability on the parole board that released him.

"The background of tort liability that makes a man responsible for the natural consequences of his actions," *Monroe v. Pape*, 365 U.S. at 187, has been discussed by this Court repeatedly. In *Babbitt v. Sweet Home Chapter, Communities for a Great Oregon*, U.S. , 115 S.Ct. 2407 (1995)(O'Connor, J., concurring), Justice O'Connor noted that "[p]roximate causation depends to a great extent on considerations of the fairness of imposing liability for remote consequences. The task of determining whether proximate causation exists in the limitless fact patterns sure to arise is best left to lower courts."[64]

Petitioners suggest that "the independent action of the official decisionmaker to enact a facially benign ordinance for proper reasons, must be a superceding cause severing the causal connection between the individual legislators' allegedly improper animus and Scott-Harris' alleged injury."[65] Pet. Br. 48. This Court recently

[64] *Id.* "We have recently said that proximate causation 'normally eliminates the bizarre,' *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995), and have noted its 'functionally equivalent' alternative characterizations in terms of foreseeability, *see Milwaukee & St. Paul R. Co. v. Kellogg*, 94 U.S. 469, 475 (1877) ('natural and probable consequence'), and duty, *see Palsgraf v. Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99 (1928). *Consolidated Rail Corp. v. Gottshall*, 512 U.S. [532], [546] (1994)."

[65] Petitioners did not request an instruction on superseding or intervening causation. They should not complain that the jury did not find the action of the city council was a "superseding cause" (Pet. Br. 48) when they failed to ask that the jury be instructed about that legal theory. Of course, the whole theory of superseding force interrupting causation derives from negligence actions, not from intentional torts. In intentional torts, comparable to § 1983 actions, it is entirely fair to hold a

defined the standard for when a subsequent event breaks the chain of proximate causation. "[A]n intervening force supersedes prior negligence and this breaks the chain of proximate causation required to impose liability on the original actor . . . 'where the subsequent actor's negligence was 'extraordinary' (defined as 'neither normal nor reasonably foreseeable.')" *Exxon Companies, U.S.A. v. Sorec, Inc.,supra.* In *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 477 n. 13 (1982), this Court said, "The traditional principle of proximate cause suggests the use of words such as 'remote,' 'tenuous,' 'fortuitous,' 'incidental,' or 'consequential' to describe those injuries that will find no remedy at law." This same view is accepted by the Restatement (Second) of Torts § 443 (1965), which says, "The intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about." *See also id.* § 442 (standards for foreseeability).

The enactment of the ordinance by the City Council was an entirely foreseeable — in fact an anticipated[66] — result of Mayor Bogan submitting the ordinance and Councilwoman Roderick shepherding it through the Ordinance Committee and then voting for it. Nothing done by the City Council, therefore, was sufficient to act as an unforeseeable superceding force of sufficient unexpected magnitude to break the chain of causation begun by the two individual defendants. The result of the City Council action — Scott-Harris' removal from City Hall — was the precise result anticipated, foreseen and, as the jury found, desired by Bogan and Roderick.

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person liable for harm he consciously intended to cause, even if some unexpected force helped that harm to occur.

[66] Bogan notified the City Clerk that Scott-Harris' position was eliminated even before the ordinance was enacted by the City Council. (Court of Appeals App. 1274 and 1275).

CONCLUSION

For the foregoing reasons, the Appellant Janet Scott-Harris respectfully requests that this Court hold (1) that municipal and local officials are entitled to no more than qualified immunity for actions taken in their legislative capacities; (2) that the actions taken by Petitioners were not of such a legislative nature as to entitle them to absolute legislative immunity; and (3) that the First Circuit Court of Appeals properly found that Petitioners' conduct was the proximate cause of Respondent's injuries. Respondent respectfully requests that this Court affirm the decision of the Court of Appeals of the First Circuit and the district court below, and remand this matter to the district court for assessment of attorneys fees and entry of judgment.

Dated: October 3, 1997

Respectfully submitted,

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APPENDIX A

State indemnification statutes

Ala. Code §11-47-24, Ark. Code Ann. §21-9-201 (Michie 1987), Cal. Government Code §§825 and 995 (West 1993), Colo. Rev. Stat. §24-10-110 (West 1990), Conn. Gen Stat. §7-465 (1997), Fla. Stat. Ann. § 111.07, et. seq. and 768.28, Ga. Code. Ann.§ 45-9-60 (1990), Haw. Rev. Stat. §§661 and 662, Idaho Code §6-903 (1990), 745 Ill Comp. Stat. 10/2-302 (1994), Ind. Code Ann. §34-4-16.7-1 (Michie 1986), Iowa Code Ann. §670.8 (West 1997), Kan. Stat. Ann. §75-6109 (1989), Ken. Rev. Stat. Ann. §65.2005 (Michie 1994), La. Rev. Stat. Ann. §13-5108 (West 1997), Me. Rev. Stat. Ann. tit. 14, §8112 (West 1996) , Md. Code Ann., Courts and Judicial Proceedings §5-403 (1995), Mass. Gen Laws ch.258, §13 (1988), Mich. Comp. Laws. Ann. §691.1408 (1997), Minn. Stat. Ann. §466.07 (West 1994), Miss. Code Ann. §11-46-7 (1972), Mo. Ann. Stat. §105.711 (1997), Mont. Code Ann. §2-9-305 (1994), Neb. Rev. Stat. Ann. §81-8239.05 (Michie 1995), Nev. Rev. Stat. Ann. §41.0349 (1989), N.H. Rev. Stat. Ann. 29-A:2 (1988), N.J. Stat. Ann. §59:10-1-10 (West 1992), N.M. Stat. Ann. §41-4-23 through -25 (1996), N.Y. Public Officer's Law §18 (McKinney's 1997), N.C. Gen. Stat. §143.300.6 (1996), N.D. Cent. Code §32-12.1-04(4) (Supp. 1993), Ohio Rev. Code Ann. §2744.07 (Banks-Baldwin 1994), Ok. Stat. Ann. tit. 51, §162 (Supp. 1995), Or. Rev. Stat. §30.285 (1988), 42 Pa. Cons. Stat. Ann. §8548 (1982), R.I. Gen. Laws §45-15-16 (1991), S.C. Code Ann. §15-78-60 (Law. Co-op. 1996), S.D. Codified Laws §3-19-1 (1994), Tenn Code Ann. §29-20-310 (1996 Supp.), Tex. Loc. Gov't. Code § 157.903 (1997 Supp.), Utah Code. Ann. § 63-30-36 (1993), Vt. Stat. Ann. 3 §1101 et. seq., Wash. Rev. Code Ann. § 4.96.041 (1997 Supp.), W. Va. Code § 29-12A-11 (1992), Wis. Stat. Ann. §895.46 (1997), Wyo. Stat. Ann. §1-39-104 (Michie 1997).

APPENDIX B

Assertions of Legislative Immunity Regarding Individual Employment Decisions

Carver v. Foerster, 102 F.3d 96 (3d Cir. 1996) (jobs of four working abolished after the supported unsuccessful candidate for local office).

Burtnik v. McLean, 76 F.3d 611 (4th Cir. 1996) (position of plaintiff abolished; new position with similar duties created instead).

Alexander v. Holden, 66 F.3d 62 (4th Cir. 1995) (resolution eliminating salary for one position).

Smith v. Lomax, 45 F.3d 402 (11th Cir. 1995) (dismissal of one employee).

Berkley v. Common Council of City of Charleston, 63 F.3d 295, 300-03 (4th Cir. 1995) (denial of causes to six identified employees).

Roberson v. Mullins, F.3d 132 (4th Cir. 1994) (dismissal of one employee).

Rabkin v. Dean, 856 F. Supp. 543 (N.D.Cal. 1994) (denial of salary increase to one employee).

Racine v. Cecil County, Md., 843 F. Supp. 53 (D.Md. 1994) (jobs of four employees eliminated).

Reitz v. Persing, 831 F. Supp. 410 (M.D.Pa. 1993) (one employee dismissed).

Rogers v. Mount Union Borough, 816 F. Supp. 308 (M.D.Pa. 1993) (one employee dismissal).

Orange v. County of Suffolk, 830 F. Supp. 701 (E.D.N.Y. 1993) (nine employees demoted or fired).

Christian v. Cecil County, Md., 817 F. Supp. 1279 (D.Md. 1993) (dismissal of three employees).

Yeldell v. Cooper Green Hosp. Inc., 956 F.2d 1056 (11th Cir. 1992) (two employees fired, one demoted, one suspended without pay).

Freeman v. McKellar, 795 F. Supp. 733 (E.D.Pa. 1992) (dismissal of one employee).

Acevedo-Cordero v. Cordero-Santiago, 958 F.2d 20 (1st Cir. 1992) (purge of identified members of the New Progressive Party by electively abolishing their jobs).

Draughon v. City of Oldsmar, 767 F. Supp. 1144 (M.D. Fla. 1991) (budget eliminated funding for position of one employee).

Bryant v. Nichols, 712 F. Supp. 887 (M.D.Ala. 1989) (demotion of a single employee).

Finch v. City of Vernon, 877 F.2d 1997 (11th Cir. 1989) (abolition of a single job).

Gross v. Winter, 876 F.2d 165 (D.C. Cir. 1989) (dismissal of single employee).

Drayton v. Mayor and Council of Rockville, 699 F. Supp. 1155 (D. Md. 1988) (position of one employee eliminated).

Herbst v. Daukas, 701 F. Supp. 964 (D.Conn. 1988) (one employee demoted after his previous position was eliminated).

Rateree v. Rockett, 852 F.2d 946 (7th Cir. 1988) (abolition of jobs of four employees).

Healy v. Town of Pembroke Park, 831 F.2d 989 (11th Cir. 1987) (city decision to abolish jobs of four police officers found to have been made to retaliate against police union for filing grievances).

Ditch v. Board of County Commissioners of County of Shawnee, 650 F. Supp. 1245 (D.Kan. 1986) (elimination of position of one employee).

Kuchka v. Kile, 634 F. Supp. 502 (M.D.Pa. 1985) (dismissal of one employee).

Meding v. Hurd, 607 F. Supp. 1088 (D.Del. 1985) (dismissal of one employee).

Hudson v. Burke, 617 F. Supp. 1501 (N.D.Ill. 1985) (six employees dismissed).

Abraham v. Pekacski, 728 F.2d 107 (3d Cir. 1984) (dismissal of an employee).

Coffey v. Quinn, 578 F. Supp. 1464 (N.D. Ill. 1983) (dismissal of one employee).

Dusanenko v. Maloney, 560 F. Supp. 822 (S.D.N.Y 1983) (salary of two employees reduced by 50%).

Ramsey v. Leath, 706 F.2d 1166 (11th Cir. 1983) (demotion of two employees).

Skrocki v. Caltabiano, 568 F. Supp. 703 (E.D.Pa. 1983) (one employee dismissed).

Visser v. Magnarelli, 542 F. Supp. 1331 (N.D.N.Y. 1982) (refusal to rehire one former employee).

Detz v. Hoover, 539 F. Supp. 532 (E.D.Pa. 1982) (refusal to reinstate one former employee).

Goldberg v. Village of Spring Valley, 538 F. Supp. 641 (S.D.N.Y. 1982) (three employees dismissed).

Oaks v. City of Fairhope, Ala., 515 F. Supp. 1004 (S.D.Ala. 1981) (salary level on one employee).

German v. Killeen, 495 F.Supp. 822 (E.D.Mich. 1980) (suspension of one employee).

Owen v. City of Independence, Mo., 421 F.Supp. 1110 (W.D.Mo. 1976) (one dismissed employee).

McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968) (dismissal of one teacher; refusal to rehire another teacher).

Aitchison v. Raffiani, 708 F.2d 96 (3d Cir. 1963) (ordinance abolishing the job of one employee held to be "politically motivated ... subterfuge").

APPENDIX C

Assertions of Legislative Immunity Regarding Action Taken to Discriminate on the Basis of Race

Burtnick v. McLean, 76 F.3d 611 (4th Cir. 1996) (alleged intent to discriminate against white worker).

Alexander v. Holden, 66 F.3d 62 (4th Cir. 1995) (commissioner who voted to abolish salary of black Clerk allegedly stated "he did not want a black clerk appointed").

Chicago Miracle Temple Church v. Fox, 901 F. Supp. 1333 (N.D.Ill. 1995) (city trustees voted to purchase property allegedly to prevent its acquisition and use by a black church group).

Smith v. Lomax, 45 F.3d 402 (11th Cir. 1995) (white clerk replaced by new black clerk, allegedly for racial reasons).

Rogers v. Mount Union Borough, 816 F. Supp. 308 (M.D.Pa. 1993) (employee allegedly dismissed because of his race).

Yeldell v., Cooper Green Hosp., 956 F.2d 1056 (11th Cir. 1992) (employees demoted of fired allegedly for racial reasons).

Calhoun v. St. Bernard Parish, 937 F.2d 172 (5th Cir. 1991) (permit for low and moderate income housing project denied after police juror allegedly expressed "vitriolic denunciation of minorities).

Stone's Auto Mart, Inc. v. City St. Paul, Minn., 721 F. Supp. 206 (D.MInn. 1989) (rezoning request from black-owned business denied when comparable request from white firm a block away granted).

Baytree of Inverrary Realty v. City of Lauderhill, 873 F.2d 1407 (11th Cir. 1989) (single plot of land rezoned to prevent construction of low income housing project allegedly to avoid an influx of black residents).

Drayton v. Mayor and Council of Rockville, 699 F. Supp 1155 (D.Md. 1988) (plaintiffs position allegedly eliminated as a method of discriminating against him because of his race).

Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983) (denial of building permit for low income apartment allegedly because tenants would include racial minorities).

German v. Killeen, 495 F. Supp. 822 (E.D.Mich. 1980) (plaintiff suspend in circumstances in which comparable whites were not suspended).

Fralin & Waldon, Inc. v. County of Henrico, Va., 474 F. Supp. 1315 (E.D.Va. 1979) (plot rezoned to prevent building of proposed low and moderate income housing allegedly because of race of likely residents).

Curry v. Gillette, 461 F.2d 1003 (6th Cir. 1972) (city council allegedly gave race-based preferential treatment to white-owned ambulance service).

Progress Development Corp. v. Mitchell, 286 F.2d 222, 227 (7th Cir. 1961) (condemnation of site of proposed housing development following "community uproar when it became known that some of the houses that plaintiffs proposed to build would be sold to Negroes and other non Caucasians).

APPENDIX D

**Assertions of Legislative Immunity
Regarding Actions Taken to Retaliate Against Individuals
for the Exercise of Free Speech
Protected by the First Amendment**

Carver v. Foerster, 102 F.3d 96 (3d Cir. 1996) (positions of four county employees abolished after they were allegedly placed on "hit list" for supporting unsuccessful candidate for Proto notary).

Alexander v. Holden, 66 F.2d 62 (4th Cir. 1995) (newly elected republican board allegedly for political reasons, abolished salary of Democratic Clerk and then created new position with same responsibilities filled by prominent Republican).

Arrington v. Dickerson, 915 F. Supp. 1503 (M.D.Ala. 1995) (denial of liquor license allegedly in retaliation for applicant's questioning of city official).

Berkely v. Common Council of City of Charleston, 63 F.3d 295 (4th Cir. 1995) (raises denied to six employees allegedly in retaliation for them to support if unsuccessful mayoral candidate).

Rabkin v. Dean, 856 F. Supp. 543 (N.D.Cal. 1994) (denial of salary increase allegedly in retaliation for employee's political associations).

Ellis v. Coffee County Bd of Registrars, 981 F.2d 1185 (11th Cir. 1993) (plaintiffs removed from voter roles allegedly in retaliation for their criticisms of county officials).

Fry v.Bd. of Cty. Com'rs of Baca, 7 F.3d 936 (10th Cir. 1993) (use of section of government services road denied in alleged retaliation for landowner's opposition to re- election of county commissioners).

Orange v. County of Suffolk, 830 F. Supp. 701 (E.D.N.Y. 1993) (employees demoted or fired for refusing to join or contribute to Republican Party).

Acevedo-Cordero v. Cordero - Santiago, 958 F.2d 70 (1st Cir. 1992) (purge of members of the New Progressive Party by newly elected Popular Democratic party officials).

Finch v. City of Vernon, 877 F.2d 1497 (11th Cir. 1989) (jury verdict that plaintiff's job was abolished in retaliation for his public statements).

Gross v. Winter, 876 F.2d 165 (D.C. Cir. 1989) (plaintiff's dismissal allegedly in retaliation for her contacting anti-defamation league of B'nai B'rith).

O'Brien v. City of Greers Ferry, 873 F.2d 1115 (8th Cir. 1989) (upholding jury verdict concluding the alderman attempted to force plaintiff to resign in retaliation for her exercise of free speech rights).

Herbest v. Daukas, 701 F. Supp. 964 (D.Conn. 1988) (police officer harassed and them demoted allegedly in retaliation for his exposure of pervasive racism in police department).

Rateree v. Rockett, 852 F.2d 946 (7th Cir. 1988) (abolition of jobs of four employees in alleged retaliation for their support for unsuccessful candidates for the City Commission).

Hudson v. Burke, 617 F. Supp. 1501 (N.D.Ill. 1985) (dismissal of six employees allegedly in retaliation for their support of the political enemies of key alderman).

Aitchison v. Raffiani, 708 F.2d 96 (3d Cir. 1983) (ordinance abolishing plaintiff's job held to be a "politically motivated subterfuge" to remove him).

Coffey v. Quinn, 578 F. Supp. 1464 (N.D.Ill. 1983) (employee dismissal allegedly in retaliation for his membership in the Fraternal Order of Police).

Dusanenko v. Maloney, 560 F. Supp. 822 (S.D.N.Y. 1983) (50% reduction in salary of two Republican officials allegedly partisan retaliation by Democrats).

Ramsey v. Leath, 706 F.2d 1166 (11th Cir. 1983) (two employees allegedly demoted because they belonged to a labor organization).

Reed v. Village of Shorewood, 704 F.2d 943 (7th Cir. 1983) (denial of liquor licenses to bar allegedly because rock and roll band performed there).

Goldberg v. Village of Spring Valley, F. Supp. 641 (S.D.N.Y. 1982) (three dismissed employees allegedly fired for supporting opponent of mayor and village trustees).

Visser v. Magnarelli, 542 F. Supp. 1331 (N.D.N.Y. 1982) (finding common council refused to rehire plaintiff because she was a Democrat).

Thomas v. Younglove, 545 F.2d 1171 (9th Cir. 1976) (alleged harassment of employees for joining nurses association).

Oberhelman v. Schultze, 371 F. Supp. 1089 (D.Minn. 1974) (liquor license allegedly denied because of contents of magazine sold in the store).

McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968) (teacher allegedly dismissed because of his association with the American Federation of Teachers).

APPENDIX E

Assertions of Legislative Immunity Regarding Nominally General Ordinance in Fact Directed at Specific Individual or Institution

Brown v. Crawford County, Ga., 960 F.2d 1002 (11th Cir. 1992) (moratorium on mobile home permits in portion of county adopted after more than 100 residents objected to a specific proposed mobile home park).

Haskell v. Washington Township., 864 F.2d 1266 (6th Cir. 1988) (abortion restrictive ordinance adopted shortly after citizens protested opening of proposed abortion clinic, and in wake of efforts by town Board of Trustees to harass clinic owners).

Invisible Empire Knights of KKK v. City of West Haven, 660 F. Supp. 1427 (D.Conn. 1985) (ordinance requiring posting of bond for public meetings of more than 25 persons adopted after city had repeatedly thwarted efforts of the KKK to hold a public meeting).

Kennedy v. Hughes, 596 F. Supp. 1487, 1490 (D.Del. 1984) (restrictive ordinance regarding tattoo parlors adopted after mayor had threatened newly opened parlor "[T]his kind of business can't be operated in Rehoboth Beach").

West Side Women's Services v. City of Cleveland, 573 F. Supp. 504 (N.D.Ohio 1983) (abortion restrictive zoning ordinance adopted to prevent opening of specific proposed clinic).

APPENDIX F

Assertions of Legislative Immunity Regarding Actions Taken for other Invidious Purposes

Burtnick v. McLean, 76 F. 3d 611 (4th Cir. 1996) (discrimination against Jewish and male employees).

Reitz v. Persing, 831 F. Supp. 410 (M.D.Pa. 1993) (ticketing officer dismissed allegedly because he refused requests by mayor and city council members that he not issue tickets to their friends).

Freeman v. McKeller, 795 F. Supp. 733 (E.D.Pa. 1992) (plaintiff allegedly fired because he rejected services of attorney hired by and then gave grand jury testimony against city council members who was subsequently indicted).

Baker v. Mayor and City Council of Baltimore, 849 F.2d 679 (4th Cir. 1990) (age discrimination in violation of Age Discrimination of Employment Act).

Bryant v. Nichols, 712 F. Supp. 887 (M.D.Ala. 1989) (employee demoted allegedly in retaliation for her earlier successful lawsuit against the city).

Haskell v. Washington Township, 864 F.2d 1266, 1270 (6th Cir. 1988) (adoption of anti-abortion zoning ordinance despite unanimous legal advice that it was unconstitutional).

Pendleton Const Co. V. Rockbridge County, 652 F. Supp. 312 (W.D. Va. 1987) (denial of permits to competitors allegedly to assure that certain business went to firm favored by Board of Supervisors).

Healy v. Town of Pembroke, 831 F.2d 989 (11th Cir. 1987) (city decision to abolish jobs of four police officers found to have been made to retaliate against police union for filing grievances).

Ditch v. Bd of County Commr's of County of Shawnee, 650 F. Supp. 1245 (D. Kan. 1986) (plaintiffs job abolished allegedly for purpose of discriminating on the basis of age).

Kuchka v. Kile, 634 F. Supp. 502 (M.D.Pa. 1985) (dismissed employee allegedly fired for providing legal representation fired for providing legal representation in suit against county commissioners).

Abraham v. Pekarski, 728 F.2nd 167 (3d Cir. 1984) (plaintiff successfully contended he was fired for refusing to deny municipal services to wards represented by members of minority faction of Township Board).

Affilated Capital Corp v. City of Houston, 735 F. 2d 1555 (5th Cir. 1984) (upholding finding that cable franchise was illicitly awarded to applicant to repay a personal debt of the mayor).

Cinevision Corp v. City of Burbank, 74 F.2d 560, 576, n. 20, 578 n 25 (9th Cir. 1984) (permission to hold "hard rock" concerts in public forum denied after City Council member objected they would attract homosexuals).

Cutting v. Muzzey, 724 F.2d 259 (1st Cir. 1984) (burdensome conditions allegedly imposed on proposed subdivision because likely purchases of homes would be Italian).

Espanola Way Corp. V. Meyerson, 690 F.2d 827 (11th Cir. 1982) (hotels allegedly harassed because residents were Cuban refugees).

Oaks v. City of Fairhope, Ala., 515 F. Supp. 1004 (S.D.Ala. 1981) (employee allegedly given a lower salary because of her sex).

APPENDIX G

Assertions of Legislative Immunity Regarding Decisions Concerning Use of One Plot of Land

Abierto v. City of Chicago, 949 F. Supp. 637 (N.D.Ill. 1996) (rezone single plot of land to preclude proposed use as a church).

Corn v. City of Lauderdale Lakes, 997 F.2d 1369 (11th Cir. 1993) (plaintiff's land rezoned to ban proposed construction project; builder's site plan disapproved).

Triomphe Investors v. City of Northwood, 835 F. Supp. 1036 (N.D.Ohio 1993) (denial of special use permit to build a condo minimum).

Calhoun v. St. Bernard Parish, 937 F.2d 172 (5th. Cir. 1991) (in response to request for permit to build low and moderate income housing, police jury issues permit limited to housing for the elderly).

Crymes v. Dekalb County, Ga., 923 F.2d 1482 (11th Cir. 1991) (denial of permit to allow specific property to be used as a landfill).

Baytree of Inverrary Realty v. City of Lauderhill, 873 F.2d 1407 (11th Cir. 1989) (rezoning of a single plot of land to forbid construction of low cost housing project).

Stone's Auto Mart, Inc., v. City of St. Paul, Minn., 721 F. Supp. 206 (D.Minn. 1989) (denial of request to rezone one plot).

Bateson v. Geisse, 857 F.2d 1300 (9th Cir. 1988) (denial of a single building permit).

Bolton v. Marple Township, 689 F. Supp. 477 (E.D.Pa. 1988) (refusal to consider request for zoning variance).

Creeksi de Associates, Inc. v. City of Wood Dale, 684 F. Supp. 201 (N.D.Ill. 1988) (rejection of builder's development plan).

Dunmore v. City of Natchez, 703 F. Supp. 31 (S.D.Miss. 1988) (denial of zoning variance).

Epstein v. Township of Whitehall, 693 F. Supp. 309 (E.D.Pa. 1988) (refusal to approval of developer's construction plan).

New Port Largo, Inc. v. Monroe County, 706 F. Supp. 1507 (S.D.Fla. 1988) (rezone plaintiffs land to prevent proposed development).

Carroll V. City of Prattville, 653 F. Supp. 933 (M.D.Ala. 1987) (plaintiffs land rezoned in a manner that precluded proposed development plans).

Jodeco, Inc. v. Hann, 674 F. Supp. 488 (D.N.J . 1987) (denial of zoning variance).

Mears v. Town of Oxford, Md., 762 F.2d 368 (4th Cir. 1985) (ordinance adopted to forbid the building of 25 boat slips by a specific marina).

Racetrack Petroleum, Inc. v. Prince George's County, 601 F. Supp. 892 (D.Md. 1985) (denial of zoning variance).

Cutting v. Muzzey, 724 F.2d 259 (1st Cir. 1984) (imposition of special burdensome requirements on specific proposed subdivision).

LaSalle Nat. Bank v. County of Lake, 579 F. Supp. 8 (N.D.Ill. 1984) (denial of sewer service to be specific landowner).

Nemmers v. City of Dubuque, Iowa, 716 F.2d 1194 (8th Cir. 1983) (rezoning a single plot of land).

Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983) (denial of building permit for low-income apartment project).

Altare Builders, Inc. v. Village of Horseheads, 551 F. Supp. 1066 (W.D.N.Y. 1982) (delay in issuing building permit).

Espanola Way Corp. v. Meyerson, 690 F.2d 827 (11th Cir. 1982) (harassment of specific hotels which housed Cuban refugees).

Kuzinich v. County of Santa Clara, 689 F.2d 1345 (9th Cir. 1982) (rezoning of two specific locations to forbid continued operation of existing adult movie theater and adult book store).

Bledgett v. County of Santa Cruz, 553 F. Supp. 1090 (N.D.Cal. 1981) (denial of application to subdivide property).

Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981) (refusal to grant request to rezone a single plot of land, admittedly made to keep down value of land in anticipation of condemnation).

Tolbeit v. County of Nelson, 527 F. Supp. 836 (W.D.Va. 1981) (rezoning of a single plot of land).

Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980) (single plot of land rezoned to prevent building of HUD sponsored multi-family dwelling).

Fralin & Waldron, Inc. V. County of Henrico, Virginia, 474 F. Supp. 1315 (E.D.Va. 1979) (plot rezoned to prevent building of low and moderate income housing).

Ligon v. State of Maryland, 448 F. Supp. 935 (D.Md. 1977) (rezoning or two parcels of land).

Shellburne, Inc. v. New Castle County, 293 F. Supp. 237 (D.Del. 1968) (one plot of land rezoned).

APPENDIX H

Assertions of Legislative Immunity Regarding Specific Licenses Permit

Bennett v. City of Slidall, 697 F.2d 657, 660 (5th Cir. 1983) (denial of plaintiff's request for a liquor license).

Reed V. Village of Shorewood, 704 F.3d 943 (7th Cir. 1983) (denial of liquor license to a single bar).

Richardson v. Town of Eastover, 922 F.2d 1152 (4th Cir. 1991) (revocation of business licenses of two night clubs).

Arrington v. Dickerson, 915 F. Supp. 1503 (M.D.Ala. 1995) (denial of liquor license).

B Street Commons v. Board of County Com'rs, 835 F. Supp. 1266 (D.Colo. 1993) (denial of special use permit for particular business).

Foerst v. Banko, 662 F. Supp. 257 (E.D.Pa. 1984) (denial of use and occupancy permit).

Ka-Haar, Inc. v. Huck, 345 F. Supp. 54 (E.D.Wisc. 1972) (revocation of liquor license).

Kinderhill Farm Breeding Associates v. Appel, 450 F. Supp. 134 (S.D.N.Y. 1978) (denial of license to operate a mobile home).

Mirshak v. Joyce, 652 F. Supp. 359 (N.D.Ill. 1987) (delay in issuance of a liquor license).

Oberhelman v. Schultze, 371 F. Supp. 1089 (D.Minn. 1974) (denial of a liquor license).

Parine v. Levine, 274 F. Supp. 268 (E.D.Mich. 1967) (refusal to permit transfer of liquor license).

Pendleton Coast Corp. v. Rockbridge County, Va., 652 F. Supp. 312 (W.D.Va. 1987) (denial of permits to operate rock quarries).